Petition

81-1407

No. _____

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In the Supreme Court of the United States

OCTOBER TERM, 1981

BENHAM-BLAIR & AFFILIATES, INC.,
d/b/a W. R. Holway & Associates
Petitioner

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HARRY M. CROWE, JR.
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The following is a list of subsidiary corporations, partnerships and trade names under which The Benham Group does business. Note: *Subsequent to judgment in this matter, Benham-Blair & Affiliates, Inc., changed their name to The Benham Group, Inc. There is no parent corporation.*

SUBSIDIARIES:

The Benham Group East, Inc. (formerly Benham-Blair & Affiliates, Inc.), a Virginia corporation, Vienna, Virginia

Technology Research and Development, Inc., an Oklahoma corporation, Oklahoma City, Oklahoma

The Benham Group West, Inc. (formerly Benham-Blair & Affiliates of California, Inc.), a California corporation, Santa Monica, California

Wildman and Morris, Inc., a California corporation, San Francisco, California

Energy Resources Group (ERG), Inc., a Delaware corporation, Oklahoma City, Oklahoma

Benham-Blair & Affiliates of Nevada, Inc., a Nevada corporation, Las Vegas, Nevada

Benham-Blair & Affiliates International, Inc., an Oklahoma corporation, Oklahoma City, Oklahoma

The Benham-Blair/SNC Company, an Oklahoma corporation, Oklahoma City, Oklahoma

Benham-Dooley-Jones, Inc., an Arizona corporation, Phoenix, Arizona

TRADE NAMES

Under Which The Benham Group (formerly Benham-Blair & Affiliates, Inc.) Does Business:

W. R. Holway & Associates, Tulsa, Oklahoma

Benham, Holway & Spragins, Tulsa, Oklahoma

Benham-Blair-Ditzler & Elling, Phoenix, Arizona

PARTNERSHIPS

in Which The Benham Group, Inc. (formerly Benham-Blair & Affiliates, Inc.) Holds a Partnership Interest:

Benham-Holway-Branton Constructors, Co., an Oklahoma partnership, Houston, Texas

A & E Property Company, an Oklahoma partnership, Oklahoma City, Oklahoma

QUESTION PRESENTED

The question presented is whether a judgment of liability by the Court of Appeals on a claim against the petitioner, which was presented for the first time at the appellate level, and a remand for the sole purpose of determining the amount of damages to be awarded on that claim has deprived the petitioner of its fundamental constitutional right to due process of law.

In the trial court proceedings, the only claim asserted by the respondent against the petitioner was one for third-party indemnification. On appeal, the Court of Appeals affirmed the trial court's third-party judgment in favor of the respondent and against the petitioner.

The Court of Appeals, however, further found that the judgment for indemnification did not adequately compensate the respondent for damages suffered as the result of the petitioner's breach of duty to the respondent, a claim raised by the respondent for the first time on appeal, and remanded the cause for the sole purpose of determination of the amount of additional damages.

The issue is whether the Court of Appeals has erred in determining liability on a claim and ground asserted for the first time on appeal and in remanding the cause for further proceedings to determine the amount of additional damages; and whether, in so doing, the Court of Appeals has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this honorable Court's supervisory powers.

LIST OF PARTIES

The following were parties to the proceedings in the Court of Appeals, whose judgment is sought to be reviewed. (Note: Two separate appeals were taken from the trial court's judgment, and the appeals were consolidated for decision by the Court of Appeals. The parties to each appeal are listed separately as they appeared in each case.)

No. 80-1247

JAMES W. MILLER,
d/b/a MILLER CONSTRUCTION COMPANY,
UNITED STATES FIDELITY AND GUARANTY
COMPANY, A Maryland Corporation
Defendants-Appellees

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff-Appellant

v.

BENHAM BLAIR & AFFILIATES,INC., A Delaware
Corporation, d/b/a W. R. HOLWAY AND ASSOCIATES
Third Party Defendant-Appellee

No. 80-1261

JAMES W. MILLER,
d/b/a MILLER CONSTRUCTION COMPANY,
UNITED STATES FIDELITY AND GUARANTY
COMPANY, A Maryland Corporation
Defendants-Appellees

v.

BENHAM BLAIR & AFFILIATES,INC., A Delaware
Corporation, d/b/a W. R. HOLWAY AND ASSOCIATES
Third Party Defendant-Appellee

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff-Appellee

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Cases:

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENHAM-BLAIR & AFFILIATES, INC.,
d/b/a W. R. Holway & Associates
Petitioner

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 660 F.2d 450 and is set forth in Appendix A hereto.

JURISDICTION

The opinion of the Court of Appeals was entered on September 22, 1981. A timely petition for rehearing was denied on October 27, 1981. The order on rehearing is set

forth in Appendix B hereto. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First and foremost, this case involves the due process clause of the Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This case also involves Rules 8(a), the first sentence of Rule 14(a) and Rule 18(a) of the Federal Rules of Civil Procedure as follows:

> "Rule 8. General Rules of Pleading
>
> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to

support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

"Rule 14. Third Party Practice.

(a) When Defendant May Bring in Third Party. At any time after the commencement of the action a defending party, as third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

"Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party."

STATEMENT OF THE CASE

This case arose out of circumstances surrounding the construction of a major sewer by the City of Broken Arrow, Oklahoma. The controversy involved disputes over alleged unpaid supply bills, the alleged failure of the City's contractor to finish the job, the City's alleged wrongful termination of the contractor's contract, and the City's engineers' alleged failure to give adequate instructions for the completion of the job.

The parties involved in the trial court were the City of Broken Arrow, its consulting engineers, Benham-Blair and Affiliates, its contractor, Miller Construction Company, a supplier, Hydro Conduit Corporation, and United States Fidelity and Guaranty Co., the contractor's bondsman.

The case was originally filed in the United States District Court for the Northern District of Oklahoma by Hydro Conduit Corp., which had supplied pipe to the contractor, Miller. Hydro Conduit had not been paid for part of the pipe it had supplied and sued both Broken Arrow and Miller for the balance due. Jurisdiction in the trial court was based upon diversity of citizenship and the amount in controversy.

The Hydro Conduit claim was disposed of in the trial court and it has not been involved in the appeals.

After commencement of the Hydro Conduit action, Broken Arrow cross-claimed against its contractor, Miller. Miller had not finished the construction of the sewer under its contract with the City, and Broken Arrow claimed damages from Miller for wrongful abandonment of the work and for the cost of repairing certain defective work.

Miller, the contractor, cross-claimed against Broken Arrow, claiming damages for wrongful termination of his contract and for loss of use of his machinery while awaiting instructions as to how to complete the job.

Broken Arrow then brought in its consulting engineers, Benham-Blair and Affiliates, as a third-party defendant. In the third-party complaint, Broken Arrow prayed that "if defendant, James W. Miller, d/b/a Miller Construction Company, recovers judgment against City of Broken Arrow, Oklahoma, [it] should be indemnified by Benham-Blair and Affiliates, Inc." The full text of the third-party complaint is set forth in Appendix C hereto.

In addition to the third-party complaint, there were two formal pre-trial orders which defined the City's claim. The second pre-trial order, by its terms, incorporated the provisions of the first pre-trial order. The first pre-trial order, drafted by the parties and approved by the court, stated the issue between Broken Arrow and Benham-Blair to be as follows:

> "13. Whether, in the event the City (Broken Arrow) is found liable to Miller, Benham-Blair in turn is liable for any such damages to the City."

The second pre-trial order, prepared after the case was assigned to a different judge, also drafted by the parties and approved by the court, recited the issue between Broken Arrow and Benham-Blair to be as follows:

> "1. The City claims if it is liable to Miller for damages, then Benham-Blair would in turn be liable to the City for such damages. The City alleges it acted solely upon the professional advice of Benham-Blair, and therefore, Benham-Blair would be liable to the City under the theory of com-

mon law indemnity."

The full text of both pre-trial orders are set forth in Appendix D and Appendix E hereto.

The case was tried to the Court without a jury with only the single issue between the City of Broken Arrow and its engineers, Benham-Blair and Affiliates, framed by the third-party complaint and the two quoted pre-trial orders. That issue was whether Broken Arrow was entitled to be indemnified by Benham-Blair and Affiliates for any liability to Miller on his cross-claim.

With regard to Broken Arrow's Cross-Claim against Miller, the trial court held that the part of the work that Miller did not perform was excused by impossibility, that he did not, therefore, wrongfully abandon the contract, and that Broken Arrow could not recover the additional cost paid to another contractor to complete the work. Broken Arrow, however, was awarded a small part of the damages it claimed from Miller for defective work performed by him.

As to Miller's Cross-Claim against the City, the trial court did not award Miller damages for wrongful termination, holding that the impossibility of performing the contract excused both parties. The trial court did, however, award Miller a judgment of $22,500 against Broken Arrow for loss of use of his equipment while awaiting instructions on how to perform the contract.

The trial court further awarded Broken Arrow judgment over against Benham-Blair for $22,500 on its third-party complaint, the $22,500 representing the City's total liability to Miller. The trial court's judgment is set forth in full in Appendix F hereto.

Broken Arrow appealed the trial court's judgment, and Benham-Blair cross-appealed. Miller did not appeal.

Broken Arrow, apparently disappointed at not recovering all of the damages that it had claimed from Miller, asserted for the first time in its brief to the Court of Appeals that it should recover those same damages directly from its engineers, Benham-Blair. The City, thus, presented a new claim and ground for recovery on appeal that it had never presented in the trial court. The Court of Appeals held that Benham-Blair was liable to Broken Arrow under this newly asserted claim, saying:

> "We further conclude that the $22,500 awarded over against Engineers does not adequately compensate City for Engineers' repeated failure to adequately and properly instruct Miller. Our review of the record does not support Engineers' categorical statement that City's damages were uncontroverted, the result of Miller's improper work, incompleted work, additional engineering fees, and the defense of lawsuits which Miller was obligated to defend, in total amount of $266,925.31. That amount may, upon remand, be determined to be the actual amount of damages incurred by City as a result of Engineers' failure to properly perform in

accordance with its contractual obligations which should be charged against Engineers in favor of City. This matter is one to be considered and determined by the trial court upon remand. Thus, upon remand, the trial court should undertake such further proceedings necessary to determine the additional costs and expenses incurred by City in completing the project which resulted from Engineers' persistent refusal to exercise reasonable care and professional skill in working with and advising Miller. These costs, if any, shall be in addition to the damage award of $22,500.00; *supra,* already assessed against Engineers in favor of City."

ARGUMENT AND AUTHORITIES

What makes this case extraordinary and significant, and worthy of this honorable Court's attention is the Court of Appeals totally disregarded the established rules of procedure when it entered its gratuitous finding of liability for a claim which was never asserted at the trial court level, of which the petitioner had no notice and has never had an opportunity to defend.

The appellate Court's judgment is clear. It establishes liability on the part of the petitioner without prior notice or opportunity to defend, and leaves only the amount of damages for determination by the trial court.

A dangerous precedent will be established if the Court of Appeals' decision is allowed to stand uncorrected; a precedent that will allow the rules of pleading and the basic right to due process of law to be ignored at the whim

of a Court. The Court of Appeals' decision in this case denies the constitutional right to due process of law, conflicts with the Rules of Civil Procedure and the decisions of this Court, and is such a departure from the accepted and usual course of judicial proceedings that it should not be permitted to stand.

Rule 14(a) of the Federal Rules of Civil Procedure authorizes third-party practice. It authorizes a third-party complaint against a person not a party "who is or may be liable to him for all or part of the plaintiff's claim."

This precise type of claim is all that was ever asserted by Broken Arrow against Benham-Blair in this case. The third-party complaint, set forth in full in Appendix C hereto, asked only for judgment for indemnification as to any judgment that Miller might obtain against Broken Arrow. It did not allege nor did it ask for any other damages from Benham-Blair.

The two pre-trial orders confirm that this was the only claim ever asserted by Broken Arrow in the trial court.

It is important to keep in mind that the question presented here is not whether the additional claim by Broken Arrow could have been asserted by a proper and timely pleading. The petitioner concedes that it most certainly could have been.

In fact, Rule 18(a) expressly provides for just exactly

that procedure, as follows:

> "A party asserting a . . . third-party claim may join, either as independent or alternate claims, as many claims, legal, equitable or maritime, as he has against an opposing party."

However, no independent or alternate claim was ever asserted by Broken Arrow until its appeal and, thus, the requirements of due process have not been met. Those requirements, as they relate to the sufficiency of pleading a claim under the modern rules of pleading, were established by this Court in *Conley* v. *Gibson*, (1957), 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, wherein it was held that the requirement is a short and plain statement,

> "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

The test is not met in this case. The third-party defendant, Benham-Blair, was never given notice at the trial level that Broken Arrow claimed anything but indemnity for any judgment that Miller might get against the City of Broken Arrow, nor was Benham-Blair given notice of the grounds upon which any such additional claim might rest.

Adequate notice of claims against a party and the opportunity to be heard are the cornerstones of judicial due process. In *Fuentes v. Shevin*, (1972), 407 U.S. 67, 92

S.Ct. 1983, 32 L.Ed.2d 556, this Court stated:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; *and in order that they may enjoy that right they must first be notified.*' (Citations omitted)." (Emphasis added)

The pleadings in the trial court in this case fail to give Benham-Blair notice of any additional claim other than that for indemnity. The petitioner, therefore, did not have an opportunity nor any reason to defend against any such unasserted claim.

The judgment of the Court of Appeals on a claim presented for the first time on appeal, with its predetermination of liability, summarily deprives petitioner of the fundamental right of due process of law, i.e., adequate notice, and an opportunity to be heard.

If permitted to stand, the Court of Appeals' opinion in this case will be seen by future litigants and Courts as an open-ended invitation to ignore the rules of pleading and the requirements of due process for notice and hearing before an impartial tribunal. The Court of Appeals has grossly departed from its prescribed function of judicial review and has become an advocate.

The Court of Appeals has agreed with Broken Arrow

that it did not ask for enough in the trial court and has now directed the trial court to give Broken Arrow that for which it failed to ask.

The Petitioner respectfully suggests that this Court should not only issue a writ of certiorari but should also enter an order of summary reversal. The decision of the Court of Appeals is palpably erroneous and should be forthwith eliminated as precedent for similar action either by Courts of Appeals or the inferior courts of the federal system.

Summary reversal will assure the petitioner that the rules of due process will be applied, and the City of Broken Arrow will not be injured thereby. Broken Arrow may still assert the subject claim in a separate action, if it so desires, but subject to the right of the petitioner to notice of the nature of the claim, the ground upon which it rests and the right to assert the defenses it may have before an impartial tribunal.

Meanwhile, the present case has been tried, appealed and affirmed. There, in accordance with the established course of judicial proceedings, it should end.

Respectfully submitted,

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Appendix

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCU'T

FILED
United States Court of Appeals
Tenth Circuit
SEP 22, 1981
HOWARD K. PHILLIPS
Clerk

No. 80-1247

JAMES W. MILLER,
d/b/a MILLER CONSTRUCTION COMPANY,
UNITED STATES FIDELITY AND GUARANTY
COMPANY, A Maryland Corporation
Defendants-Appellees

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff-Appellant

v.

BENHAM BLAIR & AFFILIATES,INC., A Delaware
Corporation, d/b/a W. R. HOLWAY AND ASSOCIATES
Third Party Defendant-Appellee

No. 80-1261

JAMES W. MILLER,
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UNITED STATES FIDELITY AND GUARANTY

COMPANY, A Maryland Corporation
Defendants-Appellees

v.

BENHAM BLAIR & AFFILIATES,INC., A Delaware Corporation, d/b/a W. R. HOLWAY AND ASSOCIATES
Third Party Defendant-Appellant

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff-Appellee

Appeal From the United States District Court
For the Northern District of Oklahoma
(D.C. No. 76-C-154)

Dennis D. King (Ray H. Wilburn with him on the brief) of Ray H. Wilburn & Associates, Tulsa, Oklahoma, for The City of Broken Arrow, Oklahoma.

Harry M. Crowe, Jr. of Crawford, Crowe & Bainbridge, Tulsa, Oklahoma, (Donald G. Hopkins of Hopkins, Warner & King, Tulsa, Oklahoma, with him on the brief), for Benham Blair & Affiliates, Inc.

David H. Sanders (Philip J. McGowan with him on the brief), Tulsa, Oklahoma (Sanders, McElroy & Carpenter, Tulsa, Oklahoma, of counsel), for James W. Miller

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Before BARRETT and LOGAN, Circuit Judges, and CHILSON, District Judge.*

BARRETT, Circuit Judge.

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*of the United States District Court for the District of Colorado, sitting by designation.

These consolidated appeals involve a contract dispute relative to the installation of a sewer line.[1]

Miller Construction Company (Miller), a utility contractor, contracted with the City of Broken Arrow, Oklahoma (City) for the installation of the line in accordance with the plans and specifications of Benham-Blair & Affiliates, Inc. (Engineers), the engineering firm retained by City to serve as its representative in the planning, designing, and inspection of the construction of City's sewer line project.

Article II of Miller's contract with City provided:

> Article II. **Contractor's Obligation** The work to be done under this contract is specifically set forth in the specifications attached hereto.
>
> The Contractor shall and will, in good and workmanlike manner, do and perform all work and furnish all supplies and materials, machinery, equipment, facilities and means, except as herein otherwise expressly specified, necessary or proper to perform ar d complete all the work required by this contract within the time herein specified, in accordance with the provisions of this contract and said specifications and in accordance with the plans and drawings of the work covered by this contract, and any and all supplemental plans and drawings, *and in accordance with the directions of the Engineers as given from time to time during the progress of the work*. The Contractor shall observe, comply with, and be subject to all terms, conditions, requirements, and limitations of the contract, and shall do, carry on, and complete the entire work to the satisfaction of the

[1] Although the suit was initiated by Hydro Conduit Corporation, the suppliers of the pipe utilized for the line, the judgment entered in its favor is not before us on appeal.

Engineers and of the City.

[R., Pl. Ex. 62] [Emphasis supplied].

Article III of Miller's contract with City provided:

Article III. **Engineers' Powers and Duties** The *Engineers shall give all orders and directions contemplated under this contract and specifications, relative to the execution of the work.* The Engineers shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract *and shall decide all questions relative to said work and the construction thereof.* The Engineers' estimates and decisions shall be final and conclusive, except as herein otherwise expressly provided. In case any question shall arise between the parties hereto relative to said contract or specifications, the determination or decision of the Engineers shall be a condition precedent to the right of the Contractor to receive any money under this contract for anything affected in any manner or to any extent by such question.

[R., Pl. Ex. 62]. [Emphasis supplied].

City's contract with Engineers provided, *inter alia*:

NOW THEREFORE, the Engineers agree to perform the engineering services herein described with respect to the investigation, design, and construction of the Project in accordance with the provisions herein set forth. The City agrees to pay the Engineers for such services at the time, in the manner, and according to the schedules herein set forth.

* * *

Section 1. **Scope of Services.** The services to be performed under this Agreement consist of the investiga-

tion and design of the Project and inspection of the construction thereof.

a. **Preliminary and General Services.** The Engineers agree to furnish services as follows:

* * *

4. The Engineers shall provide at its own expense a suitable engineering staff to *plan, design, prepare the plans and specifications, and inspect the construction of the improvements.* The engineering staff shall consist of engineers, inspectors, and assistants as may be necessary to carry on all of the engineering work required in connection therewith, in an efficient and expeditious manner.

* * *

b. **Design Services.** Design services for the project shall include the preparation of preliminary and final plans for the Project, as herein specified, *together with all specifications and related documents required for the construction of the Project by the City's construction contractor.*

[R., Def's. Ex. BA-BB 952]. [Emphasis supplied].

Shortly after Miller started working on the project it encountered an extremely muddy unstable area which would not support the sewer pipe in its natural condition. Contract Change Order No. 1 was therefore prepared by Engineers and executed by Miller and City. This change order provided, *inter alia*:

This Change Order adds Item 18 – Crushed Stone to the contract. This item is added to provide compensation for material required to provide adequate support for pipe to be installed in ditch areas where the nature of the base material is such that other available material is in-

adequate to satisfactorily support the pipe. *Such areas of unstable material could not be anticipated in advance of actual excavation.*

* * *

Under this item, crushed rock will be furnished and installed as backfill to the normal trench grade in those areas where the material encountered at the planned trench bottom is unsuitable for supporting the pipe. *Use of crushed stone in such areas of unusual nature not anticipated in normal trenching shall be authorized by the Engineer.*

The crushed stone shall have a nominal size of 1½ inch with variations to accomodate actual conditions encountered to be authorized by the Engineer.

[R., Def's. Ex. BA-BB 3B]. [Emphasis supplied].

After implementation of Change Order No. 1 Miller proceeded to install approximately 93% of the line, utilizing a large backhoe and crushed rock varying in size from 1½" to 4" to stabilize muddy, unstable areas as encountered. During the course of installing the line Miller was paid on a periodic basis in accordance with estimates prepared by Engineers for completed work inspected and approved by Engineers. Under Miller's contract with City a 10% retainage was withheld pending completion and acceptance of the line by City.

After completing 93% of the line, Miller was unable to complete the remaining 7% which extended through extremely unstable areas. At this point in time, Miller claimed it was impossible to stabilize the muddy areas utilizing crushed rock. Miller subsequently made repeated written and oral requests of Engineers for a design change as to different methods of stabilization, indicating that it would not proceed further until a

design change was provided or specific instructions were received on how to complete the project.

Despite Miller's repeated requests, Engineers did not provide specific instructions or authorize a design change. Rather, Engineers ignored Miller's repeated requests for guidance, indicating only that Miller should continue to use crushed rock to stabilize the extremely muddy areas. Engineers' inspector, John Terrell, who was assigned to the project, indicated that he talked to Engineers, his employers, about the problem several times, that he was concerned about it [R., Vol. IV, at p. 507] and that he was told by Engineers "not to worry about it, just keep trying". [R., Vol. IV, at p.511].

City subsequently, upon the advice of Engineers, denied a design change and terminated Miller for failure to proceed on the project. Miller then canceled its contract with City, alleging that City had failed to make a timely payment on the last periodic estimate. City thereafter relet the contract to another firm, Utility Contractors, who, by utilizing a "clamshell" and a large 18" riprap rock, was able to complete the contract. In completing the project, Utility Contractors proceeded on its own, without actively soliciting the advice of Engineers. Virgil McGuire, Utility Contractors' foreman, who operated a "clamshell" to remove the soupy unstable material from the pipeline ditch and also place the large 18" riprap in the ditch, testified that it would have been impossible to complete the project with the crushed rock specified by Engineers in Change Order No. 1. Robert Kuhn, area manager for Utility Contractors, stated that they did not even try to stabilize the pipeline ditch with 1½" rock because they felt that it was better to stabilize the ditch with larger rock.

Upon Utility Contractors' completion of the line and acceptance by the City, City paid it $439,016.90. Prior thereto, City had paid Miller $1,288,027.29. Thus, the total outlay amounted to $1,727,043.48, or $286,651.48 above Miller's original contract price of $1,540,392.00 as adjusted by several change orders agreed upon by Miller and City and authorized by Engineers during Miller's work on the project.

After Hydro Conduit Corporation initiated this suit against Miller and its surety, and, alternatively, against City, for pipe delivered to the project site but not paid for, Miller cross claimed against City for its withheld retainage, lost profits on the uncompleted portion of the project, and damages caused by the delay in not receiving adequate instructions with which to complete the project. City also filed a cross claim against Miller seeking damages for Miller's failure to complete the project, for defective work on that portion of the project which Miller completed, for not completing the project in a timely manner, and damages incurred by City by virtue of lawsuits filed against it by property owners along the project's right of way whose property had been damaged by Miller's installation of the line. City also filed a third party complaint against Engineers requesting indemnity from any judgment awarded to Miller in view of Engineers' failure to provide Miller adequate directions as provided for in City's contract with Engineers.

Trial was to the court. Extensive testimony and evidence was presented by each of the parties relative to the respective obligations and responsibilities of Miller and Engineers vis a vis: the proper manner in which to stabilize the soupy muddy areas; the limitations placed upon Miller by Change Order No. 1; engineers' repeated refusal to direct or supervise Miller beyond

"use more rock"; the apparent relative ease with which Utility Contractors completed the project by utilizing a "clamshell" instead of a backhoe and 18" riprap rather than the 1½" to 4" crushed rock used by Miller; the degree to which City's additional costs in completing the project were directly related to the soupy, muddy unstable areas, and/or Engineers' refusal to help Miller; and, the proper allocation of the additional costs between Miller, City, and Engineers.

Within its ruling that Miller was entitled to receive its retainage and damages for loss of use of its equipment, that City was entitled to receive a credit from Miller for repairs and cleanup by Utility Contractors on some of Miller's work, and that City was entitled to judgment over against Engineers for the damages awarded to Miller for loss of use of its equipment, the court specifically found, *inter alia*: it was preposterous and unreasonable for Engineers to expect Miller to stabilize the very muddy areas with 1¼" rock; Engineers acted unlawfully and "completely rude" in ignoring Miller's repeated requests for help; Engineers' actions were a breach of its contract with City and inexcusable; since prior to excavation the very muddy unstable ares were only known to God, City must bear the added cost of completing the project; just because Utility Contractors completed the project using larger rock does not mean that Miller was also obligated to do so when, as here, Miller did the best it could in accordance with the contract documents; Mr. McGuire, Utility Contractors' foreman testified that you could not stabilize the problem trench areas with 1½" rock and "there is not witness that has testified that said you can" [R., Vol. VI, at p.15]; and that Miller "walked out on this contract because of impossibility of performance." [R., Vol. VI, at p. 17].

In its final judgment, the court modified its prior oral findings, and ordered that: Miller's total judgment of $209,494.75 against City must be reduced by City's credits of $80,050.00, reducing Miller's recovery to a net judgment of $129,445.75; Miller is entitled to reasonable attorney fees of $25,000; Miller must defend City on any action initiated as a result of its work on the project; and City is entitled to recover $22,500 from Engineers.

On appeal, City contends: (1) the trial court erred in holding that Miller was relieved from liability on its contract with City because of impossibility of performance; (2) the trial court failed to award City adequate amounts to compensate it for damages caused by Miller's inadequate work; (3) Miller failed to prove the elements of its action; and (4) the trial court failed to award City the damages it incurred as a result of Engineers' failure to adequately instruct Miller.

Engineers contend: (1) the court erroneously excused Miller from performance on the basis of impracticability; (2) the trial court erred in rendering judgment in favor of Miller against the City and over against Engineers for loss of use of equipment after impossibility was declared; and (3) Engineers' contract with City did not require Engineers to control the contractor as to methods or techniques for performing the work.

At the outset we observe some of the basic rules governing our review. In a diversity of citizenship case the federal district court sits as a state trial court and applies the law of the forum state. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979). The federal district court, as trier of fact, has the responsibility of weighing the credibility of the witnesses. *Bingham v. Bridges*, 613 F.2d 794

(10th Cir. 1980). On appeal, the reviewing court must view the evidence in the light most favorable to the prevailing party. *Rasmussen Drilling v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144 (10th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978). A judgment may be affirmed on any ground arising from the record. *Casto v. Arkansas-Louisiana Gas Company*, 597 F.2d 1323 (10th Cir. 1979). Findings of a trial court will not be disturbed on appeal unless they are clearly erroneous. *Volis v. Puritan Life Insurance Company*, 548 F.2d 895 (10th Cir. 1977), Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A. Finally, the appellate court may, in addition to concluding that the legal ground or conclusion relied upon by the trial court is correct, hold and conclude that one or more additional grounds advanced by the prevailing party are likewise correct as a matter of law in support of the judgment. Moore's Federal Practice, Vol. 5A, §52.03[2], p. 2663; *United States v. Hunt*, 513 F.2d 129 (10th Cir. 1975). This rule blends with the rule that a judgment correct in ultimate result or effect will not be disturbed on appeal although the trial court relied upon a wrong ground or gave a wrong reason. *Securities Commission v. Chenery Corp.*, 318 U.S. 80 (1943); *Pound v. Insurance Co. of North America*, 439 F.2d 1059 (10th Cir. 1971).

I.

City contends that the trial court erred in holding that Miller was relieved from liability on its contract with City because of impossibility of performance[2] and that Miller was not entitled to recover damages because it failed to prove its case. We disagree.

[2] Engineers make a similar contention on the basis of impracticability as noted, *supra*.

It is uncontested that none of the parties anticipated that the muddy, very unstable areas within the trench would appear and that such areas would be incapable of supporting the pipeline. Change Order No. 1, prepared by Engineers and signed by Miller and City provided, *inter alia*: "Such areas of unstable material could not be anticipated in advance of actual excavation." It is also uncontested that after the implementation of Change Order No. 1 Miller made extensive and repeated attempts to stabilize the unstable areas by utilizing crushed rock in accordance with Change Order No. 1 and the Engineers' instructions, all to no avail. During Miller's work on the project many sections of pipe were laid two to four times and one section of approximately one hundred feet was taken out and relaid twenty times without success. [R., Vol. IV, at pp. 267-269].

Under the law of Oklahoma, as applied to the facts herein, the trial court properly held that Miller was relieved of liability under its contract with City because of impossibility of performance. In *Kansas, Oklahoma & Gulf Railway Company v. Grand Lake Grain Company*, 434 P.2d 153 (Okl. 1967), the Supreme Court of Oklahoma opined:

> In 84 A.L.R.2d §18 et seq. there is an extended annotation dealing with the question of impossibility of performance as a defense in actions for damages for breach of contract. It is there pointed out that the more modern rule of supervening impossibility means not only actual strict impossibility, but impracticability arising from extreme and unreasonable difficulty, loss injury or expense which may be involved.
>
> * * *
>
> "Where parties enter into a contract on the

> assumption that some particular thing essential to its performance will continue to exist and be available for the purpose, and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist and be available for the purpose, the contract shall be dissolved and the parties excused from performing it."

434 P.2d at pp.158-159.

As indicated above, none of the parties herein anticipated that the trench bottom would become and remain so unstable that it would not support the sewer line. Thereafter, with the implementation of Change Order No. 1, Engineers were steadfast in their belief that the trench could be stabilized by using crushed rock. Miller refused to continue with the contract only when it became apparent, after numerous and repeated efforts to stabilize the trench in accordance with Engineers' instructions, that the trench would not stabilize. Under such circumstances, and the law of Oklahoma, Miller was relieved from its contractual liability with City and the trial court correctly so found. Engineers repeatedly wrongfully refused to instruct Miller and/or to change the plans and specifications. The trial court's finding in this regard was not clearly erroneous. *See B's Company, Inc. v. B. P. Barber & Associates, Inc.*, 391 F.2d 130 (4th Cir. 1968).

Furthermore, under the law of Oklahoma, Miller was entitled to rely on the plans and specifications prepared by Engineers and to thereafter recover its damages and losses incurred as a result of the inadequacy of same. In *Woods v.*

Amulco Products, 235 P.2d 273 (Okl. 1951), the Supreme Court of Oklahoma opined:

> He calls attention to the statement in Oklahoma City v. Derr, supra, as follows: "A different rule applies where the contractor must build and complete a structure according to the plans and specifications by the owner. The contractor will not be required to bear extra expense resulting from the performance of the contract on account of defects in the plans and specifications prepared and submitted by the owner." (Citing numerous authorities.)—[109 Okl. 192, 235 P.221.] He also calls attention to State v. Commercial Insurance Co., 125 Neb. 43, 248, N.W. 807, 88 A.L.R. 790, and to the A.L.R. annotation to that case shown at 88 A.L.R. p. 797, wherein the general rule is stated as follows: " . . . the rule has become well settled, in practically every American jurisdiction in which the matter has been involved, that a construction contractor who has followed plans and/or specifications furnished by the contractee, his architect or engineer, and which have proved to be defective or insufficient, will not be responsible to the contractee for loss or damage which results—at lease after the work is completed—solely from the defective or insufficient plans or specifications, in the absence of any negligence on the contractor's part, or any express warranty by him as to their being sufficient or free from defects." The rule as announced above is supported by numerous citations, including Oklahoma City v. Derr, supra.
>
> 235 P.2d at p. 276.

Oklahoma's law holding that a contractor is entitled to rely on an owner's plans and specifications and that the contractor is not thereafter liable to the owner for loss or damage which

results solely from the insufficient or defective plans is in accord with numerous court decisions. *See United States v. Spearin*, 248 U.S. 132 (1918), holding that a contractor who is bound to build according to plans and specifications prepared by the owner will not be responsible for the consequences of defects in the plans and specifications; *Centex Construction Co., Inc. v. James*, 374 F.2d 921 (8th Cir. 1967), holding that where one party furnished plans and specifications for a contractor to follow in a construction job, he impliedly warrants their sufficiency for the purpose in view; and *Natus Corporation v. United States*, 371 F.2d 450 (Ct.Cl. 1967), holding that where government authors specifications it warrants that if specifications are complied with, satisfactory performance will result.

Miller's position is substantially strengthened by its repeated efforts to receive assistance in overcoming the unstable areas. In *Northern Corporation v. Chugach Electric Association*, 523 P.2d 1243 (Alaska 1974), the Supreme Court of Alaska stated:

> After Northern [contractor] had notified Chugach that it did not believe the contract could be performed by the ice haul method and Chugach continued to insist on such performance, the parties no longer were in the posture of neither warranting the specification more than the other. We hold that under the circumstances here involved, where Chugach had the technical expertise to inform itself as to ice conditions prior to insisting on performance, Chugach thereafter impliedly warranted that method in the same manner as if it had unilaterally established the specification at the time the contract was entered.
>
> 523 P.2d at p. 1246.

In that case, as here, despite repeated requests and assertions that the contract could not be performed in accordance with the plans and specifications, the owner refused to change them. There, as here, the owner was thereafter obligated to bear the losses or damages incurred as a result of compliance with the plans and specifications.

We hold that the trial court properly found that it was impossible for Miller to perform the contract according to City's plans and specifications as supplied by Engineers and that Miller, contrary to City's contention, proved its case.

II.

Engineers contend that the trial court erred in rendering judgment in favor of Miller against City and over against Engineers for loss of use of equipment after impossibility was declared. In a related contention, City urges that the trial court failed to render it an adequate award for the damages it incurred as a result of Engineers' failure to adequately instruct Miller.

Underlying Engineers' contention is the argument that the trial court erroneously determined the contract to be impossible of performance, inasmuch as Utility Contractors completed the project; accordingly, Miller was not entitled to any damages for loss of use of equipment. The fact that Utility Contractors was able to finish the project is of no moment when, as here, it is uncontested in the record that: Utility Contractors' foreman proceeded without discussing the project with Engineers; Utility Contractors completed the project by utilizing 18" riprap which Engineers did not authorize Miller to use; and Utility Contractors personnel testified that it would have been impossible to complete the project utilizing the crushed rock specified in Change Order No. 1.

Under Oklahoma law, an architect's undertakings do not imply a guarantee of perfect plans or satisfactory results, but an architect may be held liable for failure to exercise reasonable care and professional skill in the preparation and execution of plans according to its contract. *Smith v. Goff*, 325 P.2d 1061 (Okl. 1958). In *Smith*, *supra*, the Oklahoma Supreme Court opined:

> The issue so far as the architects are concerned was whether they used that degree of professional care required of them in the origination of the plans and specifications and in the supervision of the construction. The court instructed the jury on this issue. The use of various materials in the building which were not the same as those in the original specifications presented the question of the architects' professional judgment as to the suitability of the material for the purpose. The same is true concerning the methods employed "to maintain the initial effect of the building." So also, concerning the architects' supervision of construction. Architects are only required to exercise ordinary professional skill and diligence and to conform to accepted architectural standards; their contracts do not guarantee perfect plans or satisfactory results. Architects are only liable for failure to exercise reasonable care and professional skill in the preparation and execution of their plans according to their contract. Ressler v. Nielsen, N.D., 76 N.W.2d 157.
>
> 325 P.2d at p. 1064.

No less a standard should be applied herein.

The trial court found, (and this is not contested on appeal) that Miller repeatedly sought engineers' help to no avail:

> And now then we get to the real trouble here and that was the total failure of the engineering concern, architects and engineers to provide instruction and help when this impossible situation was encountered. Not only did they act unlawfully, it was completely rude to just ignore these letters, time after time after time the contractor almost praying for help, I want to do it if you will just tell me. It would be ignored. Now, the inspector on the job, Terrill, is a good man. I think he wanted to he helpful but when he would call the office and talk to Connor, I believe it was, the man that was supposed to be the field supervisor, all he would get was just tell them to keep trying, tell them to keep trying. That's not the kind of help the architect is supposed to provide under these circumstances. They let the City down and, of course, the contractor and for those faults, although I must award judgment against the City, there is no way, I don't believe legally that I could award any judgment in favor of the contractor against the architect because you don't contract with them, you contract with the City, so anything you have got coming must come from the City but then in turn I am going to make the architect pay the City because this is not something that the City should be held responsible for.
>
> [R., Vol. VI, at p. 10].

Under such circumstances, the trial court properly awarded Miller's judgment against the City for loss of use of its equipment over against Engineers. Clearly, Engineers did not exercise reasonable care and professional skill in preparation and execution of the plans in accordance with its contract with City.

We further conclude that the $22,500 awarded over against Engineers does not adequate compensate City for Engineers'

repeated failure to adequately and properly instruct Miller. Our review of the record does not support Engineers' categorical statement that City's damages were uncontroverted, the result of Miller's improper work, incompleted work, additional engineering fees, and the defense of lawsuits which Miller was obligated to defend, in total amount of $266,925.31. That amount may, upon remand, be determined to be the actual amount of damages incurred by City as a result of Engineers' failure to properly perform in accordance with its contractual obligations which should be charged against Engineers in favor of City. This matter is one to be considered and determined by the trial court upon remand. Thus, upon remand, the trial court should undertake such further proceedings necessary to determine the additional costs and expenses incurred by City in completing the project which resulted from Engineers' persistent refusal to exercise reasonable care and professional skill in working with and advising Miller. These costs, if any, shall be in addition to the damage award of $22,500.00, *supra*, already assessed against Engineers in favor of City.

In summary, the judgment entered in favor of Miller in the amount of $129,445.75 and attorney fees of $25,000.00 is affirmed. The $22,500.00 judgment awarded City against Engineers is also affirmed. The trial court's order requiring that Miller defend City on any action initiated as a result of its work on the project is affirmed except for damages attributable to Engineers' failure to properly instruct and advise Miller relative to the project. The cause is remanded for further proceedings with instructions to the trial court to make a determination relative to what, if any, additional damage award is due City from Engineers as a result of Engineers' failure to properly in-

struct and advise Miller relative to the project in accordance with the project contract.

APPENDIX B

SEPTEMBER TERM October 27, 1981

Before Honorable James E. Barrett, Honorable James K. Logan, Circuit Judges and Honorable Hatfield Chilson, District Court Judge*.

No. 80-1247 No. 80-1261

(Cross-Appeals)

HYDRO CONDUIT CORPORATION
Plaintiff

v.

JAMES W. MILLER,
d/b/a MILLER CONSTRUCTION COMPANY
Defendant – Cross-Claimant and Appellee,

UNITED STATES FIDELITY AND GUARANTY COMPANY, A Maryland Corporation
Defendant

and

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant – Third Party Plaintiff-Appellant

v.

BENHAM-BLAIR & AFFILIATES,INC., A Delaware Corporation, d/b/a W. R. HOLWAY & ASSOCIATES
Third Party Defendant and Appellee

This matter comes on for consideration of:

A. The petition of Third-party-defendant-appellant-appellee Benham-Blair & Affiliates, Inc. for rehearing.

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* Of the United States District Court for the District of Colorado, sitting by designation.

B. The petition of Third-party-plaintiff-appellant, City of Broken Arrow, Oklahoma, for rehearing.

Upon consideration whereof, it is ordered:

1. The petition of Benham-Blair & Affiliates, Inc. for rehearing is denied.

2. The petition of The City of Broken Arrow, Oklahoma, for rehearing is denied.

S/S Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX C

No. 76-C-154-B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JULY 14, 1976
Jack C. Silver, Clerk
U. S. DISTRICT COURT

HYDRO CONDUIT CORPORATION
Plaintiff

– vs –

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff

– vs –

BENHAM BLAIR & AFFILIATES,INC., A Delaware Corporation, d/b/a W. R. HOLWAY & ASSOCIATES
Third Party Defendant

THIRD PARTY COMPLAINT

1. Plaintiff, Hydro Conduit Corporation, has filed against defendant, City of Broken Arrow, Oklahoma, a complaint, a copy of which is hereto attached as Exhibit "A" and defendant, James W. Miller, d/b/a Miller Construction Company, has filed a cross-complaint against defendant, City of Broken Arrow, Oklahoma, hereto attached as Exhibit "B".

2. That the City of Broken Arrow, Oklahoma, employed an independent contractor, Benham-Blair & Affiliates, Inc., a Delaware corporation, d/b/a W. R. Holway & Associates, third party defendant, to perform engineering services including all plans and specifications and construction of said Haikey Creek Sanitary Sewer System. That defendant, City of Broken Arrow, Oklahoma, relied on the engineering skill of third party defendant, and upon the representations made thereby. That defendant, City of Broken Arrow, Oklahoma, relied upon and

followed the professional advise and instructions of third party defendant's engineer, Jewel T. Wood. That if defendant, James W. Miller, d/b/a Miller Construction Company, recovers judgment against City of Broken Arrow, Oklahoma, should be indemnified by Benham-Blair & Associates, Inc., a Delaware corporation, d/b/a W. R. Holway & Associates.

WHEREFORE, City of Broken Arrow, Oklahoma, demands judgment against third party defendant, Benham-Blair & Affiliates, Inc., a Delaware corporation, d/b/a W. R. Holway & Associates, for all sums that may be adjudged against defendant, City of Broken Arrow, in favor of plaintiff, Hydro Conduit Corporation.

F. A. PETRIK and RAY H. WILBURN

By_____
Attorneys for Third Party Defendant, and Third Party Plaintiff, The City of Broken Arrow, Oklahoma

603 Beacon Building
Tulsa, Oklahoma 74103
918 – 584-6476

CERTIFICATE OF MAILING

I, RAY H. WILBURN, do hereby certify that on the 28th day of June, 1976, I mailed a true and correct copy of the above and foregoing Third Party Complaint to Mr. David H. Sanders, 205 Denver Building, Tulsa, Oklahoma 74119, with proper postage thereon fully prepaid.

_____
Ray H. Wilburn

APPENDIX D

No. 76-C-154B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 2, 1978
Jack C. Silver, Clerk
U. S. DISTRICT COURT

HYDRO CONDUIT CORPORATION
Plaintiff

– vs –

JAMES W. MILLER, d/b/a Miller Construction Company
UNITED STATES FIDELITY
AND GUARANTY COMPANY
Defendants

– vs –

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff

– vs –

BENHAM BLAIR & AFFILIATES,INC., A Delaware
Corporation, d/b/a W. R. Holway and Associates
Third Party Defendants

PRE-TRIAL ORDER

I

A. Nature of Action as Submitted by Each Respective Party:

1. **HYDRO CONDUIT CORPORATION ("Hydro Conduit") as against:**

a. James W. Miller d/b/a Miller Construction Company ("Miller"). Hydro Conduit has sued Miller for breach of his contract with Hydro Conduit (the "Pipe Purchase Contract") to purchase certain reinforced concrete pipe for the Haikey Creek Sanitary Sewer System Project (the "Project"). Hydro Conduit has sued for the unpaid portion of the contract price of the pipe.

b. The City of Broken Arrow, Oklahoma ("City"). In the alternative, Hydro Conduit has sued City for the value of the pipe for which Hydro Conduit has not been paid since City took said pipe from Miller for its own use, and was and is claiming said pipe as its own from the time it took it for use on the Project.

c. United States Fidelity and Guaranty Commpany ("USF&G") Hydro Conduit has sued USF&G under its statutory bond whereby USF&G, as surety, bound itself to pay all indebtedness for all labor and material consumed in performance of Miller's contract with City for construction of the Project (the "Construction Contract").

2. **MILLER AND USF&G:**

a. Miller for his answer to the claims of Hydro Conduit alleges that there is no liability upon his part to pay

Hydro Conduit for pipe until the title passed from Miller to Hydro Conduit. By the terms of the Pipe Purchase Contract, the title remained in Hydro Conduit and Miller makes no claim to the pipe. Further, that by custom and usage, heavy concrete pipe is delivered and strung out along the job site by the manufacturer and because of its weight and size, by custom and usage, it is not accepted by the purchasing contractor until he inspects it just prior to getting ready to use the pipe. That the pipe in question was never inspected and accepted by Miller. The City converted the pipe in question to its own use after Miller terminated the Construction Contract with the City by reason of its default and after Miller notified Hydro Conduit that he would have no use for the pipe. Further, that Hydro Conduit was only entitled to recover from the City on quantum meruit, which rule applies only where there is no express contract. Hydro Conduit has accepted the City as its purchaser in lieu of and in place of Miller and having abandoned any express contract with Miller is barred from asserting any claim against Miller and prays that Hydro Conduit take nothing.

b. USF&G admits the execution of a statutory bond to pay for materials which were furnished to Miller and which were "used and consumed" by Miller in the performance of the Construction Contract with the City. USF&G adopts the allegations of Miller and denies that the pipe in question was "used and consumed" by Miller in the performance of the Construction Contract and, therefore, denies liability on the bond it wrote as surety

on Miller. It denies liability for materials consumed and used by the City and/or its contractor, Utilities Construction Company. It further alleges that "Hydro Conduit was only entitled to recover from the City on quantum meriut, which rule applies only where there is no express contract." Hydro Conduit has accepted the City as its purchaser in lieu of and in place of Miller and having abandoned any express contract with Miller is barred from asserting any claim against Miller and USF&G. It further denies liability for interest and attorney's fees under 61 O.S. §§1 and 2. Prays that Hydro Conduit take nothing.

c. Miller has filed a cross-complaint against the City alleging that on February 4, 1974, he entered into the Construction Contract with the City to construct Haikey Creek Sanitary Sewer and to maintain same for one year after completion. The Construction Contract provided for partial installment payments and provided that:

> "If material is encountered at the planned trench bottom which is unsuitable for supporting the pipe, the contractor shall, under these items, excavate to additional depth authorized by the Engineers and shall backfill to the normal trench grade by the use of crushed stone in order to provide a stable base for the pipe."

The City breached the Construction Contract –

FIRST, by failing to pay Partial Estimate for Payment No. 19; and,

SECOND, that when Miller encountered "bottom of trenches" which were "unsuitable for suppor-

ting the pipe" the City by and through its engineer failed to furnish him with specific directions and specifications as to the width and depth of additional excavation, the amount and gradation of stone, the compaction, shoring, piling and/or other means necessary and required to stabilize the bottom of the trench in the unsuitable areas. The only instructions received from the engineer was to use four inches of stone in some places and in other places to sometimes use "crushed stone as was necessary." Following such instructions, the pipe did not stabilize in numerous places. On many occasions, the pipe would settle. On two occasions, Miller complied with instructions but the pipe still settled. That the directions of the City, through its engineer, should have been of such design and with specific directions that upon performance, the trench bottom would be stabilized so that the pipe would remain on grade and not settle. The City also breached its contract by failing to pay Periodic Estimate for Partial Payment No. 19 for the sum of $10,072.82 when it became due on January 13, 1976.

That by reason of the retainage, earnings on Estimate No. 19, work performed which is not on estimate, interest due to late payment, delay damages incurred for loss of equipment, shut down time while waiting for instructions, costs for reworking, and profit remaining on work to be performed, Miller is entitled to judgment from the City for the sum of $264,592.11. That if Hydro Conduit recovers from Miller for the pipe in question, in that he has heretofore given the City credit for $44,949.39, he would be entitled to an additional judgment for that amount.

3. **THE CITY**:

a. The City responds that it is Miller who has breached the Construction Contract by failing to furnish the necessary equipment and employ appropriate and effective construction methods; that having refused to complete the Construction Contract, he was declared to have abandoned it, and the remaining work was let to another contractor.

b. Under the provisions of Article XXI of the Construction Contract, Miller having abandoned the contract, the City is required to make no further payment to Miller until its cost of completing the work is determined, and if the cost of completing the work exceeds the amount withheld, is entitled to recover the excess over the amount so withheld from Miller.

c. Miller further breached the Construction Contract by failing to pay Hydro Conduit for pipe furnished, as required by Article XXII of the Construction Contract, or alternatively, if the pipe is the property of Hydro Conduit, has breached the Construction Contract by failing to furnish all materials required as provided by Article II of the Construction Contract.

d. Miller breached the Construction Contract by failing to plug the open ends of the pipe as required by paragraph 5 of the General Specifications of the Construction Contract.

e. Certain parts of the work installed by Miller were defective and the City is entitled to recover the cost of correcting such deficiencies under the provisions of Article

XIII of the Construction Contract.

f. Miller has breached Article XV of the Construction Contract by failing to defend and pay all claims arising out of the work.

g. The City claims damages from defendants Miller and his surety, USF&G, on its performance bond in the sum of $494,810.31, the various items thereof being:

Sums expended to complete the contract, clean dirt and debris from the pipe and correct defective work	$493,016.90
Additional engineering cost by reason of the above	35,685.61
Legal advertising for bids	49.20
Settlements for property damage	3,000.00
Additional right of way	1,850.00
Deposition expense	208.60

with costs and interest as provided by law.

h. The City claims that if it is liable to Miller, then in such event Benham-Blair, the City's professional engineer on the Project upon whose sole advice the City acted, would in turn be liable to the City for such damages.

4. **BENHAM-BLAIR**:

a. Benham-Blair responds that it is not an insuror and it is only liable to the City if it was negligent in the performance in its contract of employment, that it was not negligent therein in that the Construction Contract, plans and specifications are in conformity with those in general use with respect to the construction of large sewer lines, and are consistent with good engineering

practice,

b. All authority and instruction required was given to the construction contractor to enable him to complete the work in accordance with the plans and specifications, but the contractor failed or refused to furnish the necessary machinery and employ appropriate and effective construction methods.

c. Having fully performed its contract, Benham-Blair prays that it be discharged with its cost as provided by law.

5. **MILLER AND U.S.F.&G. respond to the Cross-Claims of the City as follows:**

a. The City was the first to breach the Construction Contract and is estopped and barred from asserting that Miller breached or abandoned the Construction Contract.

b. Deny that the City, Benham-Blair, and Utility Construction Company have completed the contract between the City and Miller according to the specifications. The Utility-City contract included rock and the cost of installation, whereas, rock was an extra item and not included in the Construction Contract between Miller and the City. The sewer line does not comply with the infiltration-exfiltration specifications and the City approved the work of Utility which it would not approve for Miller.

B. DESIGNATION OF PARTIES:

1. Plaintiff Hydro Conduit is, and at all times herein

material was, a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in Newport Beach, California, and is duly qualified to do business in the State of Oklahoma.

2. Defendant Miller is, and at all times herein material was, a resident and citizen of the State of Oklahoma.

3. Defendant USF&G is, and at all times herein material was, a corporation duly organized and existing under the laws of the State of Maryland, with its principal place of business in Baltimore, Maryland, and is duly qualified to do business in the State of Oklahoma.

4. Defendant and Third Party Plaintiff City is a municipal corporation organized under the Statutes of the State of Oklahoma, with its principal place of business in Broken Arrow, Oklahoma, and is a subdivision government located in Tulsa County, Oklahoma.

5. Third Party Defendant Benham-Blair & Affiliates, Inc., d/b/a W. R. Holway & Associates ("Benham-Blair") is and at all times herein material was, a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in Oklahoma City, Oklahoma, and is duly qualified to do business in the State of Oklahoma.

C. PLEADINGS WHICH RAISE ISSUES:

1. COMPLAINT by Plaintiff Hydro Conduit against Defendants Miller, USF&G and City filed April 8, 1976.

2. FIRST AMENDED COMPLAINT by Plaintiff Hydro Conduit.

3. ANSWER of Defendant USF&G to Plaintiff Hydro Conduit's Complaint.

4. ANSWER of Defendant Miller and CROSS-COMPLAINT AGAINST THE CITY OF BROKEN ARROW, OKLAHOMA.

5. ANSWER of Defendant City to Plaintiff Hydro Conduit's Complaint.

6. ANSWER of Defendant City to Plaintiff Hydro Conduit's FIRST AMENDED COMPLAINT.

7. Defendant City's ANSWER TO CROSS-COMPLAINT of Defendant Miller.

8. THIRD PARTY COMPLAINT by Defendant and Third Party Plaintiff City against Third Party Defendant Benham-Blair.

9. ANSWER OF THIRD PARTY DEFENDANT, Benham-Blair to Third Party Complaint of Defendant and Third Party Plaintiff City.

10. CROSS-COMPLAINT of Defendant City against Defendants Miller and USF&G.

11. ANSWER of Defendants Miller and USF&G to Cross-Complaint of Defendant City.

II

Federal jurisdiction is founded upon diversity of citizenship and jurisdictional amount. The facts requisite to confer Federal jurisdiction are:

A. Hydro Conduit is, and at all times herein material was, a corporation duly organized and existing under the laws

of the State of Delaware with its principal office and place of business in the State of Oklahoma.

B. USF&G is, and at all times herein material was, a corporation duly organized and existing under the laws of the State of Maryland, with its principal office and place of business in Baltimore, Maryland, and is duly qualified to do business in the State of Oklahoma.

C. Miller is, and at all times herein material was, a resident and citizen of the State of Oklahoma.

D. City is a municipal corporation organized under the statutes of the State of Oklahoma with its principal place of business in Broken Arrow, Oklahoma, and is a subdivision government located in Tulsa County, Oklahoma.

E. Benham-Blair is and at all times herein material was, a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in Oklahoma City, Oklahoma, and is duly qualified to do business in the State of Oklahoma.

F. The amount in controversy, exclusive of interests and costs, exceeds $10,000.

III

The parties have discussed what facts they can mutually agree are admitted and require no further proof. It has been agreed by Hydro Conduit, Miller and USF&G that the following facts are admitted and require no proof:

A. The facts set forth in Paragraph II hereof.

B. On February 4, 1974, City entered into the Construction Contract with Miller for sanitary sewer improvements,

which contract is designated Contract 2-Haikey Creek Sanitary Sewers, EPA Project #WPC-Okla-564, for the sum of $1,496,197 but the contract price was increased to $1,540,392 by change orders numbered 1, 2 and 3. A true and exact copy of the Construction Contract is attached to the Cross-Complaint of Miller as Exhibit I.

C. On or about February 4, 1974, Miller, as principal, and USF&G, as surety, duly executed a statutory bond to the State of Oklahoma wherein and whereby said Miller, as principal, and USF&G, as surety, bound themselves, jointly and severally, in the sum of $1,496,197, conditioned that if the principal should pay all indebtedness incurred by the contractor or its sub-contractors to perform work in the performance of the Construction Contract for labor and materials and repairs to and parts for equipment used and consumed in the performance of the Construction Contract then the obligation would become null and void, otherwise to be in full force and effect. A true and exact copy of said bond is attached to Hydro Conduit's Complaint as Exhibit A.

D. On or about the 4th day of March, 1974, Hydro Conduit and Miller entered into the Pipe Purchase Contract in writing whereby it was mutually agreed between them that Hydro Conduit would sell and deliver to said Miller certain reinforced concrete pipe therein specified for use on the Project pursuant to the Construction Contract and that Miller would accept the same from Hydro Conduit and pay the sum of $455,340.40 therefor. A true and exact copy of the Pipe Purchase Contract is attached to Hydro Conduit's Complaint as Exhibit B. The Pipe Purchase Contract was amended and sup-

plemented by Exhibit 1 to the Answer of Miller to Hydro Conduit's Complaint.

E. Pursuant to the Pipe Purchase Contract, Miller ordered concrete pipe from Hydro Conduit for use in performing work under the Construction Contract. All of such pipe ordered was manufactured by Hydro Conduit for Miller to Miller's specifications and delivered by Hydro Conduit to Miller at the jobsite.

F. The only concrete pipe sold by Hydro Conduit to Miller which had not been used on the Project by Miller on February 3, 1976, the date on which Miller and City terminated their contractual relations, was 36" and 48" concrete pipe. All other concrete pipe sold by Hydro Conduit to Miller had been used on the Project on or before February 3, 1976. All concrete pipe, including the 36" and 48" concrete pipe which had not been used as of February 3, 1976, had been used and was being used on the Project in August, 1976.

G. Immediately upon termination of contractual relations between City and Miller, City took the position that since it had paid Miller for all pipe at the jobsite, the pipe was City's property and stencilled all pipe on the jobsite "Property of City of Broken Arrow" and hired a new contractor to complete the Construction Contract between Miller and the City.

H. The concrete pipe which had not been used on February 3, 1976, has been used and is being used on the Project since then by the new contractor hired by City on or about March 15, 1976, to complete Miller's contract and is buried and there is no way it can now be recovered from the ground and resold by Hydro Conduit.

I. The reinforced concrete pipe manufactured by Hydro Conduit is massive concrete pipe.

IV

The reservations as to the facts recited in Paragraph III are as follows:

A. Hydro Conduit, Miller and USF&G have no reservations as to the facts in Paragraph III.

B. City and Benham-Blair have made no final decision as to whether they have reservations as to the facts stated in Paragraph III.

V

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

NONE

VI

The following issues of fact, and no others, remain to be litigated at the trial:

A. As Submitted by Hydro Conduit:

1. Whether on or about February 2, 1976, City and Miller terminated their contractual relationship under the Construction Contract.

2. Whether all deliveries of 36" and 48" concrete pipe to Miller at the jobsite had been completed on or before August 8, 1975, and Miller owed Hydro Conduit $52,889.28 plus applicable sales taxes for pipe of that size on January 9, 1976. All deliveries to Miller at the jobsite of all other concrete pipe had been completed on

or before October 7, 1975, and Miller owed Hydro Conduit $42,830.87 for that pipe on January 9, 1976.

3. Whether on January 9, 1976, Miller paid Hydro Conduit the sum of $46,939.69 on its debt for the pipe above described, and stipulated that that payment represented one-half of all sums owed by it to Hydro Conduit. Accordingly, as requested by Miller, Hydro Conduit applied one-half of Miller's payment to the sum owed to it for unused 36″ and 48″ pipe, and one-half of Miller's payment to the sums owed to it for all other pipe, all of which other pipe had been used by Miller and buried on the Project before February 3, 1976.

4. Whether the total sum of $49,628.85 for which Hydro Conduit has brought suit against Miller in this action thus represents the unpaid one-half of the sums due and owing to Hydro Conduit for unused 36″ and 48″ concrete pipe delivered on or prior to August 8, 1975, and the unpaid one-half of the sums due and owing to Hydro Conduit for concrete pipe which had been already been used by Miller and buried on the Project before February 3, 1976.

5. Whether on March 2, 1976, for the first time, Miller notified Hydro Conduit by letter, a copy of which is attached as Exhibit A-1 to the Affidavit of Donald S. More filed July 19, 1976, that he was rejecting the unused concrete pipe, one-half of which he had already paid for in accordance with his direction. During the period of seven (7) months, between August 8, 1975, when the last of that unused pipe was delivered to Miller at the jobsite, and March 2, 1976, when the above letter

was written, Miller at no time indicated to Hydro Conduit that he had rejected the unused concrete pipe except some sections of pipe with a cost of $3,750.16 which Miller claimed had been damaged by Hydro Conduit's truck drivers. A claim was made for the latter pipe six months after its delivery by letter from Miller, dated February 4, 1976, a copy of which is attached as Exhibit A-2 to the Affidavit of Donald S. More filed July 19, 1976. Thus, until February 3, 1976, Hydro Conduit believed and had every reason to believe that Miller had accepted all of the concrete pipe, and especially so since Miller had paid Hydro Conduit for one-half of that pipe, and until March 2, 1976, Hydro Conduit believed and had every reason to believe that Miller had accepted all the unused concrete pipe except for the allegedly broken section above described.

6. Whether at no time has Hydro Conduit taken back or agreed, either in writing, as required by Paragraph 13 of the amendment and supplement to the Pipe Purchase Contract attached as Exhibit 1 to Miller's Affidavit, or orally, to take back the allegedly broken pipe, or any of the concrete pipe for that matter.

7. Whether by letter dated February 5, 1976, a copy of which is attached as Exhibit A-3 to the Affidavit of Donald S. More filed July 19, 1976, Miller admitted he was indebted to Hydro Conduit for concrete pipe in the amount of $43,139.53, but expressed doubt "as to the advisability of paying this amount in full at the present time." By letter dated March 9, 1976, a copy of which is attached as Exhibit A-4, to the Affidavit of Donald S.

More filed July 19, 1976, Miller admitted owing Hydro Conduit $44,949.39 for the concrete pipe. The discrepancy between this figure and $49,628.84 for which Hydro Conduit has sued Miller is resolved as follows:

Miller Admits Owing	$44,949.39
Amount Miller Claims for Broken Pipe	3,750.16
Interest Due to November 25, 1975	929.29
TOTALS	$49,628.84

Thus, the only discrepancy between the sum for which Hydro Conduit has filed suit and the sum Miller admits he owes is with respect to the $3,750.16 for allegedly broken pipe.

8. Whether under the Construction Contract, Miller has been paid by City for the concrete pipe ordered by Miller from Hydro Conduit. All concrete pipe has been and is being used and consumed on the Project.

9. Whether on February 4, 1976, after Miller had terminated his contractual relationship with City, Miller asked Hydro Conduit to take back not all of the unused pipe but only 80 feet of allegedly broken pipe.

10. Whether the Pipe Purchase Contract between Miller and Hydro Conduit provides as follows:

> "13. RETURNS. Standard construction materials sold under this Contract may be returned for credit only upon Seller's prior written consent and only if, in Seller's sole opinion, the construction materials to be returned are in saleable condition. Seller will deduct from any such credit all loading and unloading costs, any costs of repair and delivery costs to and from Purchaser's jobsite that were paid

by Seller. Special items of other than normal and standard design regularly sold by Seller cannot be returned."

Hydro Conduit never consented to accept a return of concrete pipe from Miller.

11. Whether Miller has stated that three months is the maximum time concrete pipe could remain at a construction site after delivery before being rejected. None of the concrete pipe ordered by Miller and delivered by Hydro Conduit, including the alleged $3,750.16 of broken pipe, was rejected within three months of the date it was delivered to Miller. None of the concrete pipe involved in this case was rejected by Miller within a reasonable period of time.

12. Whether the supplement and amendment made to the Pipe Purchase Contract between Hydro Conduit and Miller provides as follows:

> "Purchaser further agrees to pay Seller interest on all past due amounts at the maximum rate permitted by law not to exceed eighteen percent (18%) per year, and to pay Seller any and all collection fees, attorney's fees, and court costs incurred by Seller in collecting any amounts due under this Contract."

13. Whether the statutory bond by USF&G provides that USF&G "shall pay all indebtedness incurred by the Contractor" to his material suppliers.

14. Whether the supplement and amendment to the Pipe Purchase Contract between Hydro Conduit and Miller provides as follows:

"Unless otherwise expressly stated in this Contract, title to the construction materials sold hereunder shall remain with the Seller until Seller has received full payment for the same."

15. Whether all concrete pipe for the Project was inspected by M. B. Davis Engineering, an independent private consulting lab hired by Hydro Conduit, at Hydro Conduit's plants in Oklahoma City and Tulsa before the same was delivered to the jobsite by Hydro Conduit. M. B. Davis Engineering inspected the concrete pipe for both specifications and defects. Each section of concrete pipe was stamped with a rubber stamp by M. B. Davis Engineering at the conclusion of the inspection and before the same was loaded for shipment to the jobsite. Only sections of concrete pipe with the approved stamp on them were shipped by Hydro Conduit to the jobsite.

16. Whether shortly after the concrete pipe was delivered to the jobsite, an inspector for Benham-Blair, Mr. Pete Terrell, inspected the concrete pipe. If there had been any problems with the concrete pipe Mr. Terrell would have noted the same and informed Benham-Blair who would have in turn informed Miller that the pipe delivered was unacceptable.

17. Whether the concrete pipe used on the Project was of a unique size and type. It was not concrete pipe which Hydro Conduit normally keeps in stock. Upon execution of the Pipe Purchase Contract between Hydro Conduit and Miller, Hydro Conduit had the concrete pipe especially made for use on the Project.

18. Whether any concrete pipe which was delivered by Hydro Conduit to Miller was properly rejected by Miller, and if so, how much.

19. Whether City owes Hydro Conduit for the unpaid portion of the concrete pipe.

B. As Submitted by Miller and USF&G:

1. Whether any of the pipe was defective.

2. The value of the pipe.

3. Whether or not there is a three (3) months time limit for the rejection or return of pipe to Hydro Conduit by "custom and usage" or a reasonable length of time under the circumstances to return or reject.

4. Whether there is a custom and practice in the sewer construction industry with regard to:

   a. Delivery and inspection or rejection of pipe;

   b. The repair or return of defective pipe;

   c. A contractor can return unused pipe and receive a credit thereof.

5. Whether Miller ever accepted the concrete pipe in question.

6. Whether Hydro Conduit was the owner of the concrete pipe in question at the time the City and its replacement contractor, Utilities Construction Company, took over the completion of the Project, and if so, is the City liable to Hydro Conduit in conversion for the value of the pipe in question.

7. Whether the directions given to contractor by the City to

stabilize the trench bottoms which were unsuitable for supporting the pipe did or did not stabilize the trench bottoms.

8. Whether the City breached the Construction Contract with Miller by failing to pay Periodic Estimate No. 19.

9. Whether the City breached the Construction Contract by refusing and failing to give directions which when followed would have stabilized the pipe.

C. As Sumbitted by the City and Benham-Blair:

1. The purpose, meaning and intent of the part of the construction specifications which provides as follows:

> "If material is encountered at the planned trench bottom which is unsuitable for supporting the pipe, the Contractor shall, under these items, excavate to the grade by the use of crushed stone in order to provide a stable base for the pipe."

2. Whether said specification is consistent with good engineering practice and it, or a similar provision, is in general use in contracts for the construction of large sewer lines.

3. Whether excavation to additional depth was authorized by the engineer when material unsuitable for supporting the pipe was encountered.

4. Whether it was impossible to provide stable base for the pipe by the means specified by the contract, i.e. excavating to additional depth and back filling with crushed rock, as contended by Miller.

5. Whether Miller failed or refused to provide and use proper machinery for the performance of the work as

required by the provisions of Article II of the contract, as follows:

> "Article II. CONTRACTOR'S OBLIGATION The work to be done under this contract is specifically set forth in the specifications attached hereto.
>
> The Contractor shall and will, in good and workmanlike manner, do and perform all work and furnish all supplies and materials, machinery, equipment, facilities and means, except as herein otherwise expressly specified, necessary or proper to perform and complete all the work required by this contract within the time herein specified, in accordance with the provisions of this contract and said specifications and in accordance with the plans and drawings of the work covered by this contract, and any and all supplemental plans and drawings, and in accordance with the directions of the Engineers as given from time to time during the progress of the work. The contractor shall observe, comply with, and be subject to all terms, conditions, requirements, and limitations of the contract, and shall do, carry on, and complete the entire work to the satisfaction of the Engineers and of the City."

6. Whether Miller failed or refused to employ appropriate and effective construction methods in his purported attempts to stabilize the unsuitable material encountered.

7. Whether the engineer was required by the terms of the Construction Contract to furnish the contractor specific directions as to "the width and depth of excavation; the amount and gradation of stone; and whatever compaction, shoring, piling and/or other means as will be

necessary and required to stabilize the bottom of the trench in the unstable areas" as contended by Miller.

8. Whether the unstable areas could not be stabilized without the detailed specifications set forth in paragraph 7 above, as contended by Miller.

9. Whether Miller breached the Construction Contract by failing to plug the open ends of the pipe as required by paragraph 5 of the General Specifications of the Construction Contract, and, if so, the amount of damages suffered by City as a result thereof.

10. Whether parts of the sewer installed by Miller were defective and, if so, the amount of damages suffered by City as a result thereof.

11. Whether Miller abandoned the Construction Contract before completing the work required thereby, and, if so, the amount of damages suffered by City as a result thereof.

12. Whether USF&G is liable to City in the amount of damages sustained by it as a result of Miller's breach of the Construction Contract.

13. Whether, in the event the City is found liable to Miller, Benham-Blair in turn is liable for any such damages to the City.

VII

Except as specifically noted herein, the parties stipulate that identification of all exhibits listed herein is waived. However, the parties reserved all rights with respect to the materiality and admissibility of all exhibits. The parties reserve

the right to offer additional exhibits which they may discover prior to trial. In such event the party desiring to use such additional exhibit shall promptly notify the other parties and in no event less than 10 days prior to trial. The exhibits which the parties intend to offer at the trial are as follows:

A. To Be Offered by Hydro Conduit:

1. The Construction Contract between City and Miller.
2. The Pipe Purchase Contract between Miller and Hydro Conduit as supplemented and amended.
3. Statutory bond executed by USF&G, as surety, to the State of Oklahoma dated February 4, 1974, wherein and whereby Miller, as principal, and USF&G, as surety, bound themselves jointly and severally, in the sum of $1,496,197.
4. Letter dated March 2, 1976, by Miller to Hydro Conduit.
5. Letter dated February 4, 1976, by Miller to Hydro Conduit.
6. Letter dated February 5, 1976, by Miller to Hydro Conduit.
7. Letter dated March 9, 1976, by Miller to Hydro Conduit.
8. Affidavit of Miller dated July 3, 1976, filed herein.
9. Hydro Conduit Invoices for concrete pipe and materials ordered by Miller and shipped to Miller. Attached hereto as Exhibit A is a list of all such invoices.
10. Letter dated February 10, 1976, by Hydro Conduit to Miller.

11. Hydro Conduit delivery tickets pertaining to concrete pipe and materials involved in the cause. Attached hereto as Exhibit B is a list of all such delivery tickets.
12. Hydro Conduit will promptly notify Defendants of any other Exhibits to be offered at the trial.

B. To Be Offered by Miller and USF&G:

1. Letter dated February 4, 1976, from Hydro Conduit to Miller.
2. Letter dated February 4, 1976, from Hydro Conduit to the City.
3. Letter dated February 4, 1976, from Miller to Hydro Conduit.
4. Letter dated March 2, 1976, from Miller to Hydro Conduit.
5. Construction Contract between City and Miller, together with amendments, change orders and specifications.
6. PERIODICAL ESTIMATE FOR PARTIAL PAYMENT NO. 19 (dated January 13, 1976).
7. Hydro Condiut's shop drawings of concrete pipe.
8. Pictures.
9. Credit memo to City dated March 2, 1976.
10. Letter dated July 31, 1974, from Miller to Benham-Blair.
11. Letter dated September 23, 1974, from Miller to Benham-Blair.
12. Letter dated November 19, 1974, from Miller to Benham-Blair.

13. Letter dated December 10, 1974, from Miller to Benham-Blair.

14. Letter dated December 16, 1974, from Miller to Benham-Blair.

15. Letter dated July 24, 1975, from Miller to Benham-Blair.

16. Letter dated August 7, 1975, from Miller to Benham-Blair.

17. Letter dated August 14, 1975, from Miller to Benham-Blair.

18. Letter dated September 19, 1975, from Miller to Benham-Blair.

19. Letter dated December 2, 1975, from Miller to Benham-Blair.

20. Letter dated January 6, 1976, from Miller to Benham-Blair with Larry Bohaine letter attached. With respect to the Larry Bohaine letter attached, neither the City nor Benham-Blair waive identification.

21. Letter dated January 8, 1976, from Miller to Benham-Blair.

22. Letter to City from Miller dated January 28, 1976.

23. Report from Hemphill Corporation to City dated January 14, 1975, together with 12 Boring Logs attached.

24. Letter dated April 5, 1977, from L. B. Cheffey to Jim Whitlock.

25. Letter dated September 15, 1975, from L. B. Cheffey to

Jim Whitlock.

26. Letter dated July 11, 1975, from L. B. Cheffey to Jim Whitlock.

27. Letter dated October 4, 1976, from L. B. Cheffey to Jim Whitlock.

28. South Arkansas River Regional Wastewater Facilities Flow Reports:

    (a) July, 1977
    (b) August, 1977
    (c) September, 1977
    (d) October, 1977
    (e) November, 1977.

29. Sewage Treatment Plant – Monthly Report, Tulsa, Oklahoma:

    (a) November, 1976
    (b) December, 1976
    (c) January, 1977
    (d) February, 1977
    (e) March, 1977
    (f) April, 1977
    (g) May, 1977
    (h) June, 1977
    (i) July, 1977
    (j) August, 1977
    (k) September, 1977
    (l) October, 1977.

30. Operation Report of Water Pollution Control Facility for January through December, 1976.

31. Schedule of work performed not included in estimate.

32. Schedule of removing and relaying settled pipe.

33. Letter dated February 2, 1976, from Miller to City.

34. Specimens of silt.

35. Unmarked and undated memorandum on Hydro Conduit stationary. As to this Exhibit, neither the City nor Benham-Blair waive identification.

36. Letter by Larry Bohaine of Hydro Conduit to Miller. With respect to this letter, neither the City nor Benham-Blair waive identification.

37. Hydro Conduit's Amended Complaint.

38. In order to reduce the number of exhibits, Miller intends to prepare summaries of some of the above exhibits, including a summary of claims by Miller. All such summaries which Miller intends to offer at trial will be presented to the other parties prior to trial. As to any such summaries, neither Hydro Conduit, the City nor Benham-Blair waive identification until they have had an opportunity to examine the same.

C. To be Offered by City and Benham-Blair:

1. The Construction Contract including plans and specifications and all change orders thereto.

2. Map – Showing the location of the sewer, the parts constructed by Miller and part constructed by others.

3. 14 Aerial Photographs taken February 18, 1976.

4. 29 Photographs taken by G. A. Connor.

5. 8 Photographs taken by employees of Fidelity Contractors, Inc.

6. All correspondence between Miller, City and Benham-

Blair pertaining to construction in areas of unstable base.

7. Daily inspection reports of Benham-Blair inspectors.
8. Periodic estimates of completion.
9. Records of cost of completing the Construction Contract after abandonment by Miller.
10. Precise identification of all exhibits will be furnished in advance of trial as required by the rules.

VIII

The following witnesses will be called.

A. By Hydro Conduit:

1. **Donald S. More:** Mr. More is and at all times herein material was, manager of the Tulsa plant of Hydro Conduit and is fully familiar with all circumstances surrounding the sale and delivery of the concrete pipe to Miller under the Pipe Purchase Contract. He will testify to the facts set forth in Paragraphs III and VI.
2. **Robert Russell.** Mr. Russell is Sales Manager for Hydro Conduit working out of Hydro Conduit's Oklahoma City office. He will testify to the facts set forth in Paragraphs III and VI. Additionally, he will testify: that he submitted the original quotation for the Pipe Purchase Contract to Miller; that Miller entered into the Pipe Purchase Contract with Hydro Conduit for purchase of the concrete pipe; that the initial deliveries of concrete pipe to Miller were shipped from the Oklahoma City plant to Hydro Conduit and were all in conformity with the Pipe Purchase Contract; that

Miller never rejected any of the concrete pipe delivered from the Oklahoma City office; that all pipe delivered from the Oklahoma City office was used on the Project.

3. **D. P. Brown.** Mr. Brown was Production Manager of the Oklahoma City Hydro Conduit plant. He will testify to facts set forth in Paragraphs III and VI.

4. **Others.** Hydro Conduit will promptly notify the defendants of any other witnesses it will call in this case.

B. By Miller and USF&G:

1. **James W. Miller.** Mr. Miller's testimony will relate to all issues in the case.

2. **Bob Miller.** Mr. Miller's testimony will relate to all issues in the case.

3. **Gerald R. Miller.** Mr. Miller's testimony will relate to all issues in the case.

4. **Horace Lindley.** Mr. Lindley's testimony will relate to all issues in the case.

5. **Larry Bohaine.** Mr. Bohaine's testimony will relate to all issues in the case.

6. **Don Moore.** Mr. Moore's testimony will relate to all issues in the case.

7. **John W. Terrill.** Mr. Terrill's testimony will relate to all issues in the case.

8. **Lee Cheffey.** Mr. Cheffey's testimony will relate to all issues in the case.

9. **Charles L. Kimberling.** Mr. Kimberling's testimony will relate to all issues in the case.

10. **Jack Spradling.** Mr. Spradling's testimony will relate to all issues in the case.

11. **Dr. Howell Mullis.** Dr. Mullis's testimony will relate to all issues in the case.

C. By City and Benham-Blair:

1. **Jewel T. Wood.** Mr. Wood's testimony may relate to all issues in the case.

2. **Jack B. Cornett.** Mr. Cornett's testimony may relate to all issues in the case.

3. **G. A. Connor.** Mr. Connor's testimony may relate to all issues in the case.

4. **James Whitlock.** Mr. Whitlock's testimony may relate to all issues in the case.

5. **Ray Harrold.** Mr. Harrold's testimony may relate to all issues in the case.

6. **John (Pete) Terrell.** Mr. Terrell's testimony will relate to his observation of the work performed by Miller, and suggestions made by him to Miller regarding construction methods.

7. **John Addams.** Mr. Addams' testimony will relate to his observations of the work performed by Miller, and suggestions made by him to Miller regarding construction methods.

8. **Cline Mansur.** Mr. Mansur's testimony will relate to the question of whether the construction specifications are consistent with good engineering practice.

9. **Charles Kimberling.** Mr. Kimberling's testimony will relate to the question of whether the construction

specifications are consistent with good engineering practice.

10. **Charles King.** Mr. King's testimony will relate to the question of whether the construction specifications are consistent with good engineering practice and the appropriate and effective method of implementing the specification pertaining to stabilizing unstable base with crushed rock.

11. **Robert Hinton.** Mr. Hinton's testimony will relate to the question of whether the construction specifications are consistent with good engineering practice and the appropriate and effective method of implementing the specification pertaining to stabilizing unstable base with crush rock.

12. **Robert Kuhns.** Mr. Kuhns' testimony will pertain to the appropriate and effective method of implementing the specification pertaining to stabilizing unstable base with crushed rock. He will also testify as to the completion of those parts of the contract not completed by Miller, and the correcting of certain defective work done by Miller and the cost thereof.

13. **Arnold Braswell.** Mr. Braswell's testimony will pertain to the appropriate and effective method of implementing the specification pertaining to stabilizing unstable base with crushed rock. He will also testify as to the completion of those parts of the contract not completed by Miller, and the correcting of certain defective work done by Miller.

14. **Virgil McGuire, Jr.** Mr. McGuire's testimony will per-

tain to the appropriate and effective method of implementing the specification pertaining to stabilizing unstable base with crushed rock. He will also testify as to the completion of those parts of the contract not completed by Miller, and the correcting of certain defective work done by Miller.

15. **Donald S. More.** Mr. More may testify concerning the design of the pipe used on the project.

16. **Robert Phillips.** Mr. Phillips' testimony will pertain to the necessity of cleaning the mud and debris from the interior of the line and the cost thereof.

17. **Richard Williams.** Mr. Williams' testimony will pertain to his inspection of the line after completion.

18. **William B. Smith.** Mr. Smith's testimony will pertain to his inspection of the line after completion.

19. **Steve Anderson.** Mr. Anderson's testimony will pertain to his inspection of the line after completion.

20. **Dorothy Simmons.** Mrs. Simmons' testimony will relate to her duties as City Auditor and will show that all disbursements made by the City on the Construction Contract to Miller were paid.

IX

The following issues of law, and no others, remain to be litigated upon the trial:

A. As Submitted by Hydro-Conduit:

1. Whether the Pipe Purchase Contract between Hydro Conduit and Miller was a binding obligation upon

Miller to pay Hydro Conduit for all concrete pipe ordered and accepted by Miller.

2. Whether the concrete pipe is "goods" as defined in 12A O.S. 1971, §2-105 thereby making Oklahoma's Uniform Commercial Code ("UCC") applicable to this action; whether Hydro Conduit and Miller are "merchants" as defined in the UCC (12A O.S. 1971, §2-104); and whether the Pipe Purchase Contract is of the type covered by the UCC (12A O.S. 1971, §2-106).

3. Whether Miller's right of rejection of concrete pipe delivered by Hydro Conduit under the Pipe Purchase Contract applies only to non-conforming concrete pipe (12A O.S. 1971, §2-602 and Comment 3 thereto).

4. Whether under the UCC (12A O.S. 1971, §2-602(1), any rejection of non-conforming concrete pipe delivered by Hydro Conduit must be made within a reasonable period of time by Miller.

5. Whether with respect to the $3,750.16 worth of allegedly broken pipe, Miller's notification to Hydro Conduit more than six months after it was delivered of the alleged defects is rejection of the pipe within a reasonable time under 12A O.S. 1971, §2-602(1).

6. Whether with respect to the remainder of the concrete pipe for which there is no evidence of non-conformity, Miller's notification to Hydro Conduit more than seven (7) months after it was delivered is rejection of the pipe within a reasonable time under 12A O.S. 1971, §2-602(1).

7. Whether Miller's acts were inconsistent with Hydro

Conduit's ownership of the concrete pipe and such acts together with Miller's failure to reject any of the concrete pipe within a reasonable period of time conclusively establishes under the UCC (12A O.S. 1971, §2-601, 2-602 and 2-606) and the Pipe Purchase Contract that Miller accepted all of the concrete pipe delivered by Hydro Conduit.

8. Whether under the UCC (12A O.S. 1971, §2-202), the Pipe Purchase Contract between Miller and Hydro Conduit, which expressly provides the manner and circumstances in which concrete pipe may be returned to Hydro Conduit and contradicts Miller's alleged "custom and usage" in the industry of returning pipe, controls and manner and circumstance of returning any unused concrete pipe.

9. Whether Miller's Affidavit dated July 3, 1976 filed herein stating that the "custom and usage" in the concrete pipe industry that suppliers of pipe would take pipe in return as much as three (3) months after delivery of the same is conclusive evidence as to what is a reasonable time a contractor would have to reject any non-conforming concrete pipe.

10. Whether under the UCC (12A O.S. 1971, §2-401), Hydro Conduit's right to sue Miller for damages for failure to pay for the concrete pipe is dependent upon whether "title" to the concrete pipe has passed to Miller.

11. Whether under the UCC (12A O.S. 1971, §2-701(1), Hydro Conduit's remedy for Miller's failure to pay the balance owed for the concrete pipe is "An Action For The Price".

12. Whether the concrete pipe has been "used and consumed in performance" of the Construction Contract in accordance with the terms of the satutory bond by USF&G; specifically, whether the concrete pipe which was ordered by Miller and delivered by Hydro Conduit pursuant to the Pipe Purchase Contract, but was installed in the Project by the contractor hired by City to replace Miller after Miller's termination of the Construction Contract with City was "used and consumed in performance" of the Construction Contract within the meaning of the statutory bond.

13. Whether under 15 O.S. 1971, §266, and under the Construction Contract between Miller and Hydro Conduit which provides for interest at the rate of 18% per annum on all past due amounts, Miller is indebted to Hydro Conduit for interest at 18% per annum on the principal sued on.

14. Whether under the provisions of 12 O.S. 1971, §936 and under the express terms of the Construction Contract between Miller and Hydro Conduit, Miller is indebted to Hydro Conduit for a reasonable attorney's fee incurred by Hydro Conduit in collecting amounts due under the Construction Contract.

15. Whether under the terms of the statutory bond, USF&G is liable for both interest and attorney's fees owed by Miller to Hydro Conduit.

16. Whether City is liable to Hydro Conduit for the unpaid portion of the concrete pipe.

17. Whether under the terms of the statutory bond, USF&G

is liable for both interest and attorney's fees owed by City to Hydro Conduit.

18. All issues of fact submitted by Hydro Conduit under Paragraph VI hereof to the extent that the same are not properly classified as issues of fact.

B. As Submitted by Miller and USF&G:

1. Whether USF&G, as surety, is liable to Hydro Conduit for materials which Miller, its principal, did not incorporate into the Project.
2. Whether the first cause of action against Miller for alleged breach of contract of purchase is inconsistent with the second cause of action against the City for quantum meruit, i.e., that one repudiates the other and Hydro Conduit must elect which of the inconsistent theories it will proceed upon.
3. Whether this is an action under 61 O.S. §§1 and 2 for recovery of moneys on a statutory bond or an action to recover on the sale of goods under the Uniform Commercial Code.
4. Whether the title to the pipe remained in the seller, Hydro Conduit, until payment had been received by the terms of the Pipe Purchase Contract between Hydro Conduit and Miller.
5. Whether the City, by and through its engineer, was bound by the Construction Contract to give the contractor specific directions as to the use of crushed stone to stabilize trench bottoms unsuitable for supporting the pipe which, when followed, would have stabilized the pipe.

6. Whether attorney's fees and interest are recoverable under 61 O.S. §§1 and 2.

7. Whether or not a contract to manufacture pipe to specifications is a contract for the sale of goods or is a contract to manufacture and does not fall within the uniform commercial code and 12 O.S. §936.

8. Whether the City breached the Construction Contract by failing to pay Miller Periodic Estimate for Partial Payment No. 19 when it was due.

9. Whether a party who has breached a contract can thereafter declare the other party to be in default and take over performance of the contract or whether the default of the first party relieves the second party from performance of the contract.

10. All isues of fact submitted by Miller and USF&G under Paragraph VI hereof to the extent that the same are not properly classified as issues of fact.

C. As Submitted by City and Benham-Blair:

All issues of fact submitted by City and Benham-Blair under Paragraph VI hereof to the extent that the same are not properly classified as issues of fact.

X

The parties have met and discussed the possibility of settlement, and it is believed by each of the parties hereto that there exists no real possibility of settling their respective causes.

XI

The foregoing admissions having been made by the parties,

and the parties having specified the foregoing issues of fact and law remaining the litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

XII

OTHER MATTERS

1. Miller moves the Court to require Hydro Conduit to elect upon which inconsistent theory it will proceed and declare whether it elects to proceed upon contract or upon quantum meruit.

2. Hydro Conduit respectfully requests the Court to overrule Miller's motion to require Hydro Conduit to elect upon which inconsistent theory it will proceed and declare whether it elects to proceed upon contract or upon quantum meruit.

May 2, 1978.

S/S Allen E. Barrow
United States District Judge

APPROVED AS TO FORM AND CONTENT:

S/S Bob F. McCoy
Attorney for Plaintiff,
Hydro Conduit

S/S David H. Sanders
Attorney for Defendants,
Miller and USF&G

S/S Ray H. Wilburn
Attorney for Defendant,
City

S/S Harry M. Crowe, Jr.
Attorney for Benham-Blair

S/S Donald G. Hopkins for Paul P. McBride
Attorney for Benham-Blair

APPENDIX E

No. 76-C-154-D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 19, 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

HYDRO CONDUIT CORPORATION
Plaintiff

vs.

JAMES W. MILLER, d/b/a Miller Construction Company
UNITED STATES FIDELITY
AND GUARANTY COMPANY, a Maryland corporation
Defendants

vs.

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff

vs.

BENHAM-BLAIR & AFFILIATES,INC., A Delaware
corporation, d/b/a W. R. Holway and Associates
Third Party Defendant.

PRE-TRIAL ORDER

On May 10, 1979, a pre-trial conference was held by the undersigned judge with all attorneys representing parties in the above-entitled cause. The attorneys each set forth the position of their respective parties. This Pre-trial Order is a brief statement by the parties of their respective positions in the case as understood by the Court.

The following definitions shall be applicable herein:

– "Hydro Conduit" means Hydro Conduit Corporation, the Plaintiff herein.

– "Miller" means James W. Miller, d/b/a Miller Construction Company, one of the Defendants herein.

– "USF&G" means United States Fidelity and Guaranty Company, one of the Defendants herein.

– "City" means the City of Broken Arrow, Oklahoma, one of the Defendants and Third Party Plaintiff herein.

– "Benham-Blair" means Benham-Blair & Affiliates, Inc., d/b/a W. R. Holway and Associates, Third Party Defendant herein.

– "Project" means the Haikey Creek Sanitary Sewer Line for the City.

– "Construction Contract" means the contract between the City and Miller for the construction by Miller of the Project.

– "Pipe Purchase Contract" means the contract between Miller and Hydro Conduit wherein Hydro Conduit

agreed to furnish certain concrete pipe to Miller for the Project.

– "Engineering Service Contract" means the contract between the City and Benham-Blair dated September 5, 1972, whereby Benham-Blair agreed to provide consulting engineering services to the City on the Project.

– "UCC" means the Oklahoma Uniform Commercial Code (12A O.S. 1971, §§1-101 through 10-104).

I. HYDRO CONDUIT v. MILLER

A. Statement of Hydro Conduit's Claim Against Miller.

1. Hydro Conduit claims Miller breached the Pipe Purchase Contract by failing to pay Hydro Conduit for the balance owed thereunder for concrete pipe manufactured by Hydro Conduit and sold to Miller.

2. Hydro Conduit further claims under 15 O.S. 1971, §266 and under the express terms of the Pipe Purchase Contract, Miller owes it for interest on all past due amounts thereunder at the rate of 18% per annum until paid.

3. Hydro Conduit further claims under 12 O.S. 1971, §936 and under the express terms of the Pipe Purchase Contract, Miller owes it for reasonable attorney's fee incurred in collecting amounts due thereunder.

B. Statement of Miller's Defenses to Claim of Hydro Conduit.

1. A provision of the Pipe Purchase Contract provides:

> "Unless otherwise expressly stated in this Contract, title to the construction materials sold hereunder shall

remain with the Seller until Seller has received full payment of same."

Miller claims the foregoing provision relieved him of his obligation to pay Hydro Conduit the balance owed on the Pipe Purchase Contract when his contractual relationship with the City under the Construction Contract was terminated.

2. Miller further claims there is an implied term to the Pipe Purchase Contract created by the custom and usage of the concrete pipe industry which provides concrete pipe like that involved in this case may be delivered and strung out along the job site many months before it is used by the contractor and the contractor does not accept the concrete pipe so delivered until it is inspected by him just prior to getting ready to use it.

3. Miller further claims the foregoing implied contract term is applicable in this case, and he had never inspected and accepted the unused concrete pipe on the job site at the time his Construction Contract with the City was terminated.

4. Miller further claims the unpaid balance on the Pipe Purchase Contract relates just to the unused concrete pipe on the job site at the time the Construction Contract was terminated. In other words, Miller claims the unused concrete pipe on the job site at the time of termination of the Construction Contract was all unaccepted by him and the balance owed on the Pipe Purchase Contract related solely to such unaccepted concrete pipe.

5. It is further Miller's claim that since he never accepted the unused concrete pipe pursuant to the implied term of the Pipe Purchase Contract, he never owed Hydro Conduit for it. He further claims that since he never owed Hydro Conduit

for the unused concrete pipe, he never paid Hydro Conduit for it, and since he never paid Hydro Conduit for it, title to the concrete pipe never passed to him. Therefore, Miller alleges the City converted Hydro Conduit's pipe to its own use after termination of the Construction Contract and is the proper party to pay Hydro Conduit for it.

C. Hydro Conduit's Response to Miller's Defenses.

1. Hydro Conduit claims the Pipe Purchase Contract is governed by the UCC and under the UCC the issue of who technically has title to the concrete pipe at any given time is not relevant to resolving the issue of whether Miller owes Hydro Conduit for breach of the Pipe Purchase Contract. Accordingly, Hydro Conduit claims the provision of the Pipe Purchase Contract keeping title to the concrete pipe in Hydro Conduit until payment therefore is received does not provide Miller with a defense to Hydro Conduit's breach of contract action.

2. Hydro Conduit claims there was no implied term to the Pipe Purchase Contract created by the custom and usage of the concrete pipe industry which allowed Miller to wait until just before use of the concrete pipe to inspect and accept the same. However, Hydro Conduit claims such an implied term, even if it existed, did not relieve Miller of its obligation to pay Hydro Conduit the balance owed on the Pipe Purchase Contract because, under the UCC Miller had a right to reject acceptance of only that concrete pipe which failed to conform to the Pipe Purchase Contract. Hydro Conduit claims all of the concrete pipe delivered by it to the job site conformed to the Pipe Purchase Contract, and, therefore, Miller had no right to refuse acceptance thereof.

3. It is further Hydro Conduit's claim that, except for a very small amount of concrete pipe totaling $3,750.16, Miller has never contended the concrete pipe delivered by Hydro Conduit failed to conform to the Pipe Purchase Contract.

4. Hydro Conduit further claims even if some of the concrete pipe did fail to conform to the Pipe Purchas Contract, Miller failed to exercise his right to reject acceptance withing a reasonable period of time as required by UCC.

5. Hydro Conduit further denies that the unpaid balance of the Pipe Purchase Contract relates solely to the unused concrete pipe at the time the Construction Contract was terminated. Instead, Hydro Conduit claims most of the unpaid balance relates to the balance owed for concrete pipe delivered in August, September and October of 1975. Hydro Conduit claims Miller paid (except for certain disputed sales tax amounts) one-half of the amount billed for the August, September and October 1975 delivered pipe. Hydro Conduit claims most of the August, September and October 1975 delivered pipe was, in fact, installed by Miller. Accordingly, Hydro Conduit claims Miller has paid one-half of the purchase price for certain concrete pipe installed by Miller and one-half for certain pipe uninstalled at the time the Construction Contract was terminated. Hydro Conduit claims such method of payment is inconsistent with Miller's claim that he had not accepted the unused concrete pipe and that the unpaid balance of the Pipe Purchase Contract relates to concrete pipe unused at the time of termination of the Construction Contract.

6. Finally, Hydro Conduit denies it accepted the City as the purchaser of the unused concrete pipe when the Construc-

tion Contract was terminated. Instead, Hydro Conduit claims it attempted to expedite payment of the balance owed on the Pipe Purchase Contract by requesting the City to pay it out of Hydro Conduit's retainage under the Construction Contract. Hydro Conduit claims it has never sought payment from the City except from funds the City was holding on behalf of Miller and except to state a cause of action in this lawsuit in the alternative against the City in the event Miller is held by the Court not to be liable to Hydro Conduit.

II. HYDRO CONDUIT v. USF&G

A. Statement of Hydro Conduit's Claim Against USF&G

1. Hydro Conduit's claim against USF&G is based upon a statutory bond whereby USF&G, as surety, bound itself jointly and severally to pay all indebtedness for all labor and material used and consumed in performance of the Construction Contract.

2. Hydro Conduit claims that the bond obligates USF&G to pay Hydro Conduit the unpaid portion of the Pipe Purchase Contract, plus all interest accrued thereon, all costs of this action and a reasonable attorney's fee.

3. If Miller for any reason is excused of his obligation to Hydro Conduit by reason of the conduct of the City, then it is Hydro Conduit's claim that under the terms of the statutory bond USF&G is nevertheless obligated to Hydro Conduit for the unpaid portion of the Pipe Purchase Contract, plus all interest accrued thereon, all costs of this action and reasonable attorney's fee.

B. Statement of USF&G's Defenses to Hydro Conduit's Claim.

1. USF&G adopts all of Miller's defenses.

2. Further, USF&G contends that the unpaid portion of the Pipe Purchase Contract relates solely to the concrete pipe not installed at the time Miller's Construction Contract with the City was terminated. Therefore, USF&G contends it is not liable for such amount since the concrete pipe to which such amount allegedly relates was not "used and consumed" on the project by Miller in performance of the Construction Contract.

3. Even if USF&G is liable to Hydro Conduit for the unpaid portion of the Pipe Purchase Contract, it claims the statutory bond does not cover interest on such amount, costs and attorney's fee.

III. MILLER v. THE CITY

A. Statement of Miller's Claim Against the City.

1. Miller claims the City breached the Construction Contract by: (1) failing to pay Partial Estimate for Payment No. 19; and (ii) failing, when he encountered bottom of trenches which were unsuitable for supporting the concrete pipe, to furnish him with specific directions and specifications as to the width and depth of additional evacuation, the amount and gradation of stone, the compaction, showing piling and/or other means necessary and required to stabilize the bottom of the trench in the unsuitable areas. Miller claims he suffered damages in the amount of $264,592.11 because of such alleged breaches

2. Miller also claims as an additional item of damages the sum of $44,939.39 since he issued a credit memo to the City for that amount, which Miller claims represents the

amount owed to Hydro Conduit for the unused concrete pipe at the time the Construction Contract was terminated. This item of damages would only be owing if Hydro Conduit successfully recovers such amount or more from Miller in its cause against Miller.

B. Statement of the City's Defense to Miller's Claim.

1. The City claims Miller abandoned the Construction Contract. Therefore, the City claims it was justified in not paying Partial Estimate for Payment No. 19 because under Article XII of the Construction Contract it is required to make no further payments to Miller until the cost of completing the abandoned work is determined. If the cost of completing the abandoned work exceeds the withheld amount, the City is entitled to recover the excess amount from Miller.

2. The City further claims the specifications and instructions of the Construction Contract were sufficient for Miller to complete the Project.

3. In addition to Miller's allegedly abandoning the Construction Contract, the City claims the following additional breaches of the Construction Contract occurred which permitted it to replace Miller as the contractor: (i) Miller failed to furnish necessary equipment and employ appropriate and effective construction methods; (ii) Miller failed to pay Hydro Conduit for concrete pipe furnished as required by the Construction Contract, or alternatively, if the concrete pipe is the property of Hydro Conduit, has breached the Construction Contract by failure to furnish all materials required thereunder; (iii) Miller failed to plug the open ends of the concrete pipe as required in general specifications of the Construction Contract; and (iv)

Miller has failed to defend and pay all claims arising out of the Construction Contract as required thereunder.

C. Statement of Miller's Response to the City's Defenses.

Miller responds that all of the breached alleged by the City of Miller were caused by the City failing to provide adequate specifications and instructions to Miller.

IV. THE CITY v. MILLER

A. Statement of the City's Claims Against Miller.

1. The City claims Miller breached the Construction Contract for the reasons set forth in paragraphs II B. 1 and 3 hereof.

2. As a result of Miller's alleged breaches of the Construction Contract as set forth in paragraph III B. 1 and 3 hereof, the City claims damages from Miller in the aggregate amount of $494,810.31 as follows: (i) sums expended to complete the Construction Contract, clean dirt and debris from the concrete pipe and correct defective work – $493,016.90; (ii) additional engineering costs resulting from subparagraph (i) – $35,685.61; expense of legal advertising for bids – $49.20; (iii) settlements made for property damage – $3,000.00; (iv) cost of additional right of way – $1,850.00; (v) deposition expense – $208.60; (vi) plus all costs and interests as provided by law.

B. Statement of Miller's Defenses to Claims by the City.

Miller denies he breached the Construction Contract and claims that all of the breaches alleged by the City of Miller were caused by the City failing to provide adequate specifications and instructions to Miller.

V. THE CITY v. USF&G

A. Statement of the City's Claims Against USF&G.

The City claims USF&G is liable to it for damages caused by Miller for breaches of the Construction Contract as Miller's surety under the performance bond issued by USF&G.

B. Statement of USF&G's Defense to the Claims by the City.

1. USF&G adopts all of Miller's defenses.

2. Further, USF&G contends it is not liable for work not actually performed by its principal, Miller, on the Project.

VI. THE CITY v. BENHAM-BLAIR

A. Statement of the City's Claims Against Benham-Blair.

1. The City claims if it is liable to Miller for damages, then Benham-Blair would in turn be liable to the City for such damages. The City alleges it acted solely upon the professional engineering advice of Benham-Blair, and, therefore, Benham-Blair would be liable to the City under the theory of common law idenmnity.

2. The City further claims in the event the City is liable to Hydro Conduit for the unpaid portion of the Pipe Purchase Contract for concrete pipe delivered by Hydro Conduit to the Project, Benham-Blair in turn would be liable to the City for such amounts because of a breach by Benham-Blair of a duty owed to the City under paragraph 10, Section 1A of the Engineering Service Contract to keep track of and to ascertain all payments by Miller to his materialmen, suppliers and subcontractors including Hydro Conduit for supplies and materials, including all concrete pipe delivered to the Project.

B. Statement of Benham-Blair's Defense to the Claim by the City.

1. Benham-Blair denies its duty to the City is one of indemnitor or insurer, but instead claims its duty is measured by the standard of care and skill of those skilled in the engineering profession. Therefore, Benham-Blair believes it is liable to the City only for damages resulting from faults in construction resulting from defects in the plans caused by its failure to exercise the standard of care and skill of the professional engineering industry.

2. Benham-Blair alleges the City has never contested that Benham-Blair failed to exercise the proper standard of care and skill in engineering the Project, and, in fact, that Benham-Blair did exercise such skill and care in that the plan and specifications were consistent with good engineering practice.

3. Benham-Blair denies there is any duty imposed on it under the Engineering Service Contract to keep track of and to ascertain all payments by Miller to his materialmen, suppliers and subcontractors, including Hydro Conduit for supplies and materials, including all concrete pipe delivered to the Project. The City further claims that the City is barred from making any claim that Benham-Blair breached the Engineering Service Contract for the reason that the same has not been plead by the City in its Third Party Complaint filed herein.

VII. OTHER MATTERS

1. On May 2, 1978, a prior Pre-trial Order was agreed upon by the parties hereto and entered by the Court herein. Said prior Pre-trial Order is not overruled, but instead is hereby attached and made a part of this Pre-trial Order for use

by the parties and the Court herein.

2. Hydro Conduit's pending motion for a separate trial of its cause is overruled.

3. The City notifies all parties that the Engineering Service Contract will be one of its Exhibits at trial. The Engineering Service Contract has not been previously identified as an Exhibit.

June 15, 1979.

S/S Fred Daugherty
United States District Judge

APPROVED AS TO FORM AND CONTENT:

S/S Donald G. Hopkins
Attorney for Benham-Blair

S/S David H. Sanders
Attorney for Defendants,
Miller and USF&G

S/S Ray H. Wilburn
Attorney for Defendant,
the City

S/S Harry M. Crowe, Jr.
Attorney for Benham-Blair

S/S Bob F. McCoy
Attorney for Plaintiff,
Hydro Conduit

APPENDIX F

No. 76-C-154-D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 5, 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

HYDRO CONDUIT CORPORATION
Plaintiff

vs.

JAMES W. MILLER, d/b/a MILLER CONSTRUCTION COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation
Defendants

vs.

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff

vs.

BENHAM-BLAIR & AFFILIATES,INC., A Delaware corporation, d/b/a W. R. HOLWAY AND ASSOCIATES
Third Party Defendants

FINAL JUDGMENT

This cause came on for hearing on this 28th day of January, 1980, upon the various motions and applications of the parties which have been filed subsequent to the findings of fact and conclusions of law made by the Court after the trial of this cause on November 8, 1979, at which time James W. Miller appeared by his attorney, David H. Sanders; the City of Broken Arrow, Oklahoma, appeared by its attorney, Ray Wilburn, and Benham-Blair & Affiliates, Inc. appeared by its attorney, Harry Crowe. The Court, after having heard and considered the testimony of witnesses sworn and examined in open court and having reviewed the files, transcript, and exhibits, and having heard the argument of counsel and being fully advised in the premises, finds that the findings of fact made and entered by the Court on November 8, 1979, should be modified in that the judgment that the defendant, James W. Miller, should have and recover from the defendant, The City of Broken Arrow, Oklahoma, should be reduced in that damages awarded for the loss of the use of the crane in the sum of $45,000.00 should be reduced to $22,500.00 and that it was the intention of the Court to award the City of Broken Arrow, Oklahoma, a credit for remedial work done in deeping the line in shale and for expenses incurred by the City of Broken Arrow, Oklahoma, in cleaning out the mud caused by Miller leaving the sewer end pipes open and that the Court has concluded that the sum of $38,000.00 should be credited to The City of Broken Arrow, Oklahoma, for remedial work for which Miller is liable to it. That in addition to the $19,550.00 heretofore credited to The City of Broken Arrow, Oklahoma, an additional sum of $60,500.00 should be credited to The City of Broken Arrow, Oklahoma, for a total of

$80,050.00, reducing the full recovery of $209,494.74 in favor of Miller and against The City of Broken Arrow, Oklahoma, to a net recovery of $129,445.74 for which jdugment should be entered in favor of Miller and against The City of Broken Arrow, Oklahoma.

The Court further finds that the defendant, James W. Miller, is ordered and directed to take over and defend The City of Broken Arrow, Oklahoma, in an action instituted in the District Court of Tulsa County, Oklahoma, by John M. Clark and Linda Ann Clark, as plaintiffs, and W. R. Holway and Associates, a division of Benham-Blair & Affiliates, Inc., Miller Construction Company, and City of Broken Arrow, a municipal corporation, as defendant, Cause No. C-75-2569, and shall defend "any matter or thing arising from the Contractor's carrying on or manner of doing the work, or any act or omission on his part relative to the performance of his duties hereunder, and shall pay any and all judgments recovered by any and all persons for damages growing out of the execution of the work covered by this contract, whether such judgment or judgments be against the City, or any of its officers, agents or employees," without prejudice to the claims of Miller against The City of Broken Arrow, Oklahoma, if any he has, under Article XV of said contract.

The Court further finds that Miller is entitled to recover judgment of and from The City of Broken Arrow, Oklahoma, for a reasonable attorney's fee in the sum of $25,000.00 and for its costs herein expended.

The Court further finds that judgment in favor of The City of Broken Arrow, Oklahoma, and against the third party defendant, Benham-Blair & Affiliates, Inc. should, likewise, be

reduced from the sum of $45,000.00 to the sum of $22,500.00. The Court finds that the application and claim of The City of Broken Arrow, Oklahoma, for attorney's fees as against third party defendant, Benham-Blair & Affiliates, should be denied.

The Court further finds that all motions for modifications of the findings of fact entered herein on November 8, 1979, and request for additional findings of fact and conclusions of law except as herein sustained today, shall be overruled and that a final judgment should be rendered as hereinabove set forth.

NOW, THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED by the Court that the defendant, James W. Miller, d/b/a Miller Construction Company, have and recover a judgment of and from the defendant, The City of Broken Arrow, Oklahoma, for the sum of $129,445.74, with interest thereon at the rate of 6% per annum from February 2, 1976, until January 28, 1980, and thereafter at the rate of 12% per annum until paid in full, and for the further sum of $25,000.00 as attorney's fees and costs of this action.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED by the Court that third party plaintiff, The City of Broken Arrow, Oklahoma, have and recover a judgment of and from third party defendant, Benham-Blair & Affiliates, Inc., a Delaware corporation, d/b/a W. R. Holway and Associates, for the sum of $22,500.00, with interest thereon at the rate of 12% per annum until paid in full, and for costs of this action.

S/S Luther B. Eubanks

United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
FEB 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1407

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENHAM-BLAIR & AFFILIATES, INC.,
d/b/a W. R. Holway & Associates
Petitioner

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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and

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Cone-Lewis Printing Co. • 323 E. 3rd • Tulsa, Okla. 74120 • Phone (918) 582-1234

The City of Broken Arrow is a municipal corporation organized under the laws of the State of Oklahoma. There are no subsidiary corporations. There is no parent corporation.

QUESTION PRESENTED

The question presented is whether the Court of Appeals violated Petitioner's right to due process of law by affirming a finding of liability against Petitioner entered by the Trial Court and remanding the case to the Trial Court for further proceedings on the issue of damages.

In the trial proceedings, there were a multitude of claims and cross-claims filed by the five parties to the action. The liability on several of these claims and cross-claims turned on the factual question of whether the Petitioners, acting as engineers, had provided sufficient plans and direction to the construction contractor. The Trial Court held that the Petitioner did not provide sufficient plans and/or directions to the contractor. The Trial Court found that Petitioner was liable to Respondent for damages proximately caused by Petitioner's breach of contract. The Trial Court found that $22,500.00 were the only damages proximately caused by said breach of contract. The Respondent appealed and Petitioner cross-appealed. The Court of Appeals affirmed the various judgments entered by the Trial Court, but remanded the case to the Trial Court for further proceedings on the issue of damages.

The issue is whether the Court of Appeals has departed from the usual and accepted course of judicial proceedings by determining that the Trial Court did not consider all damages proximately caused by Petitioner's breach of contract.

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No. 81-1407

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENHAM-BLAIR & AFFILIATES, INC.,
d/b/a W. R. Holway & Associates
Petitioner

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent requests that the Writ of Certiorari be denied and the mandate entered by the United States Court of Appeals for the Tenth Circuit be allowed to stand.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 15 of the Federal Rules of Civil Procedure as well as the Constitutional and Statutory Provisions cited by Petitioner. Rule 15 states:

"Rule 15. Amended and Supplemental Pleading

"(a) **Amendment.** A party may amend his pleading

once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise, a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the Court otherwise orders.

"(b) **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgement; the failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the grounds that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to inable the objecting party to meet such evidence.

"(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempting to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

"The delivery or mailing of process to United States attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into an action as a defendant.

"(d) **Supplemental Pleadings.** Upon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supple-

mental pleading, it shall so order, specifying the time therefore."

STATEMENT OF THE CASE

This case arose out of circumstances surrounding the construction of a major sewer line by the City of Broken Arrow, Oklahoma. The case was originally filed in the United States District Court for the Northern District of Oklahoma by Hydro Conduit Corporation, which had supplied pipe to the contractor, Miller. Hydro Conduit had not been paid for part of the pipe it had supplied and sued both Broken Arrow and Miller for the balance due. Hydro Conduit was awarded a judgment against Miller and said judgment was not appealed.

After the commencement of the Hydro Conduit action, Miller cross-claimed against the City of Broken Arrow. The City in turn cross-claimed against Miller and filed a Third Party Complaint against Benham-Blair & Affiliates, Inc. The Petitioner has already provided the Court with a copy of the Third Party Complaint and the two Pre-Trial Orders entered in the case. In addition to those documents, the City of Broken Arrow filed a Trial Brief setting forth its claims and defenses. As set forth in the Trial Brief, the City's claim against its engineers, Benham-Blair & Affiliates, Inc., was in the alternative. The City requested judgment against Benham-Blair only if the City did not obtain a judgment against Miller or if Miller obtained a judgment against the City. The City's alternative

claim against Benham-Blair was for breach of contract and common law indemnity. The full text of the "Trial Brief of City of Broken Arrow" is set forth in Appendix A hereto.

The case proceeded to trial and during opening statements, Benham-Blair characterized the contractor's legal position as impossibility of performance. The Trial Court rendered its opinion from the bench at the conclusion of the evidence. The Trial Court found in favor of the contractor and against the City. The Tenth Circuit Court of Appeals in its opinion cited the portion of the Trial Court opinion wherein the Trial Judge stated the basis for his ruling. The pertinent portion of said opinion is as follows:

> "And now then we get to the real trouble here and that was the total failure of the engineering concern, architects and engineers to provide instruction and help when this impossible situation was encountered. Not only did they act unlawfully, it was completely rude to just ignore these letters, time after time after time the contractor almost praying for help, I want to do it if you will just tell me. It would be ignored. Now, the inspector on the job, Terrill, is a good man. I think he wanted to be helpful but when he would call the office and talk to Connor, I believe it was, the man that was supposed to be the field supervisor, all he would get was just tell them to keep trying, tell them to keep trying. That's not the kind of help the architect is supposed to provide under these circumstances. They let the City down and, of course, the contractor and for those faults, although I must award

> a judgment against the City, there is no way, I don't believe legally that I could award any judgment in favor of the contractor and against the architect because you don't contract with them, you contract with the City, so anything you have got coming must come from the City but then in turn, I am going to make the architect pay the City because this is not something that the City should be held responsible for."

The Trial Court proceeded to award the contractor a judgment against the City in the amount of $209,495.74. This amount included the contractor's claim of $45,000.00 for loss of use of equipment incurred as a result of the engineer's failure to give directions to the contractor. The City was allowed an offset to the contractor's judgment in the amount of $19,550.00 as a result of attorney fees and costs incurred for claims and lawsuits filed for right-of-way damages. The City was awarded a judgment against Benham-Blair in the amount of $45,000.00 to cover the portion of the judgment against the City on the item of damages for loss of use of equipment.

The Trial Court in rendering said judgments stated its reason for only allowing Broken Arrow to recover judgment against the engineers in the amount of $45,000.00 as follows:

> "The real reason was this hassle that extended over months for the failure of the engineers to go out and give instructions, either written or oral, on how to avoid this problem. And that was a problem

> that's almost unprecedented. One or two witnesses had on other projects encountered similar problems but none as difficult as this. And since the condition prior to excavation was known only by God, there is no fault on the engineers, now, in failing to mention it or discover it and for that reason the extra costs that must and did flow directly from this bad situation can only fall on the City because if you would have had the most diligent engineers in the world, the best inspector and four or five of them, the City is going to be faced with a great added cost when you run into this so that is one item that the City is going to have to pay to the contractor for which you cannot be reimbursed by the architects. It's only the damages that flowed directly from the breaches of the contract by the architects that the City can be recompensed for." (R., Volume IV at Page 12)

Various post-trial motions were filed by the City, Benham-Blair and the contractor. The City in support of its post-trial motions filed "Brief in Support of Broken Arrow's Proposed Findings of Fact and Conclusions of Law, Motion to Amend Judgment and Proposed Journal Entry". In said brief, the City set forth its breach of contract and common law indemnity claims against Benham-Blair. Said brief outlined the damages the City contended that it had proved against Benham-Blair at trial. A full text of said brief is set forth in Appendix B hereto.

At the hearing on the post-trial motions, the Trial Court reduced the amount awarded to the contractor for the loss of use of his equipment from $45,000.00 to

$22,500.000. The judgment against the City was reduced in this amount and likewise the judgment in favor of the City and against Benham-Blair was reduced in said amount. The Trial Court also awarded the City an additional offset against the contractor's judgment in the amount of $38,000.00 for remedial work for which the contractor was liable.

The City appealed and Benham-Blair cross-appealed. In its brief in chief, the City again set forth its breach of contract theory and common law indemnity theory against Benham-Blair. In said brief, the City again outlined the damages proximately caused by Benham-Blair's breach of contract. Benham-Blair responded to the City's contentions in part by stating that the City did not include said claims in its Third Party Claim and the Pre-Trial Orders. The City replied by pointing to the Trial Brief, the evidence introduced at trial without objection, and the post-trial motions. The City in replying to Benham-Blair's lack of notice contention relied upon Federal Rule of Civil Procedure 15(b). The Tenth Circuit, in effect, affirmed all of the rulings and judgments of the Trial Court except for the Trial Court's finding that only the loss of use item of damage claimed by the contractor was proximately caused by Benham-Blair's breach of contract. The issue of damages proximately caused by Benham-Blair's breaches of contract was remanded to the Trial Court for further proceedings.

ARGUMENT AND AUTHORITIES

The present case involves five parties. The parties were aligned in such a manner as to make this a four sided lawsuit. There were at least five claims and/or cross-claims. Due to the number of parties, claims and defenses, this was a complicated case. However, the case is not extraordinary and significant as those terms are used in Rule 17 of the Rules of the Supreme Court of United States. The Court in *Rice v. Sioux City Memorial Park Cemetary, Inc.*, (1955) 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 649, discussed the types of cases which the Court would consider on a Petition for Certiorari. The Court stated:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict, would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals. . . . "

In the present case, the Court of Appeals was faced with a situation wherein the Trial Court had already determined that Benham-Blair was liable to the City of Broken Arrow and awarded the City a judgment. Furthermore, the Trial Court held that the City was liable to the contractor due to Benham-Blair's failure to give adequate

directions to the engineer when muddy conditions were encountered. Benham-Blair, in its opening statement at trial, characterized the contractor's defense to the City's claim as impossibility of performance. That was the first time that legal theory had been presented in the case. The presentation of the legal theory of impossibility of performance provided little benefit to the City or Benham-Blair because the Trial Court found that Benham-Blair did not give adequate directions to allow the contractor to overcome said muddy conditions. The Trial Court further found that Benham-Blair had an obligation to the City to give adequate directions to the contractor. Under those circumstances, the primary question presented to Appellate Court between the City and Benham-Blair was the extent of damages proximately caused by Benham-Blair's breach of its contract with the City of Broken Arrow.

On appeal, Benham-Blair for the first time raised its contention that it had not received adequate notice of the City's claims against it. In considering this contention, the Tenth Circuit had before it the trial record and was advised that the City had filed a trial brief and post-trial motions. Thus the Court of Appeals was aware that the City's contentions, concerning Benham-Blair on appeal, had previously been raised in the City's Trial Brief, post-trial motions and the evidence presented at trial. The City took the position in the appeal that any defects in its pleadings concerning Benham-Blair were curable under Federal Rule

of Civil Procedure 15(b). Under these circumstances, the Tenth Circuit Court of Appeals was unpersuaded by Benham-Blair's lack of notice claim.

Considering the record and questions which were presented to the Tenth Circuit Court of Appeals, the ruling by the Tenth Circuit cannot be considered extraordinary. The Tenth Circuit correctly identified the primary issue between the City and Benham-Blair as one concerning proximate cause. Benham-Blair's assertion of defects in the pleadings and Pre-Trial Orders are within the scope of Federal Rule of Civil Procedure 15. The Court of Appeals did not base its ruling on any unusual procedural or constitutional question. In short, since no issues of importance to the public in general revealed by the present case, no compelling reason exists for this Court to review the ruling by the United States Court of Appeals for the Tenth Circuit.

At best, Petitioner Benham-Blair has raised issues the resolutions of which are dependent upon a record which is admittedly subject to different interpretations. The Court in *National Labor Relations Board v. Pittsburg S.S. Company,* (1951) 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 in dealing with a similar situation stated:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded Judges

> could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record, a Court of Appeals under the new dispensation finds the board's order unsubstantiated. In such situation, we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations'..."

The Respondent respectfully suggests that this Court should deny the present Petition for Writ of Certiorari and allow the opinion and mandate of the Tenth Circuit Court of Appeals to stand.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED
U.S. DISTRICT COURT
NOV 5, 1979
JACK C. SILVER
Clerk

No. 76-C-154-D

HYDRO CONDUIT CORPORATION
Plaintiff

v.

JAMES W. MILLER,
d/b/a MILLER CONSTRUCTION COMPANY,
and UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Maryland Corporation
Defendant

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff

v.

BENHAM-BLAIR & AFFILIATES, INC. a Delaware
Corporation, d/b/a W. R. HOLWAY AND ASSOCIATES
Third Party Defendants

TRIAL BRIEF OF CITY OF BROKEN ARROW

Prior to February 4, 1974, the City of Broken Arrow recognized that it's sewerage treatment plant was becoming overloaded. This condition was becoming critical and was expected to deteriorate further with continued growth of the City. To correct the situation the City Manager, in conjunction with the Mayor and City Council, employed the engineering firm of W. R. Holway and Associates to design the Haikey Creek Sanitary Sewer System. The sewer system was to divert a portion of the sewerage flow away from the treatment plant. In due course, W. R. Holway and Associates submitted to the City Council a proposed design of the sanitary sewer system. The City put the project up for bid and accepted the low bid of Miller Construction Company.

On February 4, 1974, the City entered into a written contract with the Miller Construction Company for the construction of the Haikey Creek Sanitary Sewer System. The original contract price was for $1,496,197.00. Due to various changes in the design and specifications the contract price was altered to a final contract price of $1,540,392.00. Miller, in accordance with his construction contract, purchased a Performance Bond from United States Fidelity and Guaranty Company. UFS&G agreed, under its Performance Bond to guarantee Miller's performance of the contract with the City. Several of the clauses of Miller's contract which will be pertinent to the Court in the trial of this case are stated below:

> "Article II. **Contractor's Obligation.** The work to be done under this contract is specifically set forth in the specifications attached hereto.
>
> The contractor shall and will, in good and workman like

manner, do and perform all work and furnish all supplies and materials, machinery, equipment, facilities and means, except as herein otherwise expressly specified, necessary or proper to perform or complete all the work required by this contract within the time herein specified in accordance with the provisions of this contract and said specifications in accordance with plans and drawings of the work covered by this contract, and any and all supplemental plans and drawings, in accordance with the directions of the engineers as given from time to time during the progress of the work. The contractor shall observe, comply with, and be subject to all terms, conditions, requirements, and limitations of the contract, and shall do, carry on, and complete the entire work to the satisfaction of the engineers and of the City.

Article V. **Time for Completion.** It is hereby understood and mutually agreed, by and between the parties hereto, that the date of beginning, rate of progress, and the time of completion of the work to be done hereunder are essential conditions of this contract, and it is further mutually understood and agreed, by and between the parties hereto, that the work embraced in this contract shall be commenced within 15 days from and after the date of execution of this contract, and said party of the second part agrees that said work shall be prosecuted regularly, diligently, and uninterrupted at such uniform rate of progress as will insure full completion thereof within *300 calendar days* for work included in Section A, if awarded separately, or within *180 calendar days* for work included in Section B, if awarded separately, and within *365 calendar days* for work included in both Section A and B, if awarded in a single contract, all from and after the date of execution of this contract, and it is expressly understood and agreed by and between the

parties hereto that the above date or time for the completion of the work described herein is a reasonable time for the completion of the same, taking into consideration average climatic and the usual run of industrial conditions prevailing in this locality.

If the said party of the second part shall neglect, fail, or refuse to complete the work within the time specified herein, then the said party of the second part does hereby agree as part of the consideration for the awarding of this contract to pay said City, party of the first part, not as a penalty, but as liquidated damages for such breach of contract, $50.00 for each calendar day of neglect, failure or refusal to complete the work after the time set forth above as herein before provided.

That said amount is fixed and agreed upon between the parties hereto, because of the impracticality and extreme difficulty of fixing and ascertaining the actual damages first party would in such event sustain; and said amount is presumed by the parties to this contract to be the amount of damage which said first party would sustain.

It is further agreed that time is of the essence of each and every portion of this contract and the specifications wherein a definite and certain time is fixed for the performance of any act whatsoever; and where under the contract an allowance for additional time for the completion of any work is made, the new time fixed by such extension shall be of essence to this contract.

Article XIII. **Defective Work.** Any inspection of the work shall not relieve the contractor of any of his obligations to fulfill his contract as herein prescribed and defective work shall be made good and unsuitable or improper materials in kind or condition shall be rejected, although incorporated in the work, notwithstanding that such work or materials may have been overlooked by the

engineers and accepted or estimated for payment. The contractor, as soon as may be after receiving written notice from the engineers, shall remove from the grounds, to such a distance as the latter may direct, all materials, whether worked or unworked, and shall tear down all portions of the work which the engineers shall condemn as unsound or improper, or as in any way failing to conform to the specifications or to any plans or drawings of the work or to the terms or conditions of this contract.

If the contractor shall fail or neglect to replace any defective work or to discard condemned materials within a reasonable time after the service by the engineers of any order to replace such defective work or discard such materials, the City may cause said defective work to be replaced or the condemned materials to be discarded and acceptable materials provided, and the expense thereof shall be deducted from the amount paid to the contractor.

Article XV. **Contractor's Risk and Responsibility.** The performance of the contract and the work is at the risk of the contractor until the final acceptance thereof and payment therefor. He shall take all responsibility of the work, and shall bear all losses resulting to him on account of the amount or character of the work, or because the nature of the land in or on which the work is done is different from what is assumed or expected, or on account of the weather, floods, fire, wind storms, or other action of the elements, or any cause or causes whatsoever for which the City is not responsible. If the work or any part or parts thereof is destroyed or damaged from any of the aforesaid causes, the contractor, at his own cost or expense, shall restore the same or remedy the damage. The City shall not be liable to the contractor

for any neglect, default, or delay of any other contractor on this project.

The contractor, at his own cost and expense, shall assume the defense of all claims, actions, suits or proceedings of every kind brought against the City or any officers or agents thereof, on account of any matter or thing arising from the contractors carrying on or manner of doing the work, or any act or mission on his part relative to the work, or any act or mission on his part relative to the performance of his duties hereunder, and shall pay any and all judgments recovered by any and all persons for damages growing out of the execution of the work covered by this contract, whether such judgment or judgments be against the City, or any of its officers, agents, or employees.

Article XXI. **Abandonment of the Work.** In case at any time the engineer shall be of the opinion and shall certify in writing to the City, or the City shall be of the opinion that the work has been abandoned, or that the requirements of this contract as to the rate of progress have not been fulfilled, or that the contractor has neglected or refused to supply a sufficiency of properly skilled workmen or suitable equipment or materials of the proper quality, or has failed in any respect to prosecute the work with promptness or diligence or has neglected to fulfill the requirements of the contract or is incompetent, after the City gives notice in writing of its intention, at least 48 hours before taking possession as hereinafter specified, to the contractor, if present on the work, or if not then and there present, to a representative designated by him as aforesaid, the City may terminate the employment of the contractor and enter in and take possession of the premises and the work and entire plant and equipment of the contractor, and may use the same

to complete and may complete the specified work by day work, by contract, or otherwise, purchasing any necessary materials therefor, or may require the surety hereunder to complete said work, at the option of the party of the first part; and in case of taking possession as aforesaid, the contractor shall not receive any other payment under this contract until said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the City in finishing the work as aforesaid, the amount of the excess shall be paid to the contractor; but if such expense shall exceed the unpaid balance, the contractor shall pay the difference to the City. All provisions of this Article shall apply to each sub-contractor on the work.

Article XXII. **Claims Under Lien Law.** The contractor shall furnish the City, from time to time upon demand, with satisfactory evidence that all persons who have done work or furnished materials under this agreement for or in performance with the work specified herein, are entitled to no further compensation; and in case such evidence be not furnished as aforesaid, such amount as is necessary to meet the lawful claims of the persons aforesaid may be retained until such evidence thereof is furnished; or in the event such evidence is not furnished, the City may apply any sums retained by it as aforesaid or so much thereof as may be necessary therefor, to pay any valid claims for work or material furnished and charge the amount so disbursed against the contractor, together with the costs of any action or actions that may be brought to enforce such claims."

After the execution of the construction contract, Miller provided the City with the USF&G Performance Bond and started performance. To obtain the sewerage pipe needed for

the project, Miller contracted with the Hydro-Conduit Corporation. Miller's contract with Hydro-Conduit called for Hydro-Conduit to manufacture and deliver the sewerage pipe for the project. Hydro-Conduit manufactured and delivered all the pipe requested by Miller. Miller made substantial payments on his contract to Hydro-Conduit. As the pipe was delivered to the job site by Hydro-Conduit it was regularly invoiced and billed to the City by Miller. By January 1, 1976, the City had paid Miller for all pipe delivered to the site by Hydro-Conduit. In January, 1976, the City, upon the recommendation of its engineers, found that Miller had abandoned the project. Miller refused to pay Hydro-Conduit and Hydro-Conduit informed the City, on February 4, 1976, that it was claiming the pipe. The City denied the claim of Hydro-Conduit on the grounds that the City had already purchased the pipe from Miller. In March, 1976, Miller tendered to the City a credit memorandum for the pipe claimed by Hydro-Conduit, but the City rejected and refused to accept Miller's credit memorandum and chose to keep the pipe.

Between February 4, 1974, and January, 1976, Miller performed substantial protions of the project and received $1,288,027.29 from the City as part payment of the total contract price. The sum paid by the City to Miller covered all work performed by Miller from February 4, 1974, to December 8, 1975, and all of the pipe that had ever been delivered by Hydro-Conduit to the job site.

During the period of time where Miller was working on the project, he encountered several areas where the earth was unsuitable in its natural condition for the laying of sewer pipe. These areas were unsuitable in their natural condition because

there was a high ground water table and the soil was of such a character that it tended to combine with the water and flow. In short, these areas were basically muddy. Miller contacted the engineers and was told that under the contract he was to dig these areas out and fill with rock in order to establish a stable base for the sewer pipe. Miller attempted, in some of these areas, to dig the trenches deeper with a backhoe and then fill with rock. This method did not work. Miller then complained to the engineers that the design was inadequate. It was suggested to Miller that if he used a clamshell to remove the muddy material from the trench and then use the clamshell to replace the mud with rock then that method would work. Miller rejected the suggestion of the engineers and skipped over the areas which were not naturally stable. By January, 1976, Miller had laid most of the sewer pipe in those areas which were stable in their natural condition, but had not completed laying the sewer pipe in any of those areas which were unusable in their natural condition.

By January, 1976, Miller had informed the City and the engineers that he would not continue work on the project unless the design was changed in those areas which were not usuable in their natural condition. It should be noted, that a design change would enable Miller to charge more money that provided for in the original contract under the original design. The engineers and the City reviewed the original design and contract and decided that the original design was correct if the contractor would use proper construction methods. The City then found, upon the written recommendation of its engineers, that Millller had abandoned the contract.

At the time the contract was abandoned by Miller there still remained substantial work to be done on the project. Miller had

not completed laying the pipeline and had not cleaned up the right-of-way. In some of the unstable areas Miller had laid part of the pipeline, but had not stablized the soil base for the pipeline. To complete the project properly those sections of pipeline which Miller had improperly installed, had to be reworked.

While laying the pipeline Miller had used more than the right-of-way acquired by the City for the pipeline. As a result of Miller's use the land and property of various private individuals was damaged. Several of these individuals sued the City of Broken Arrow and received settlements for their damages. In one instance, the City had purchased a temporary right-of-way from Jack Wright so that Miller would have adequate space in which to work. Miller delayed working in this area and the City's temporary right-of-way expired. Miller then continued to use the area and was trespassing on Mr. Wright's land because of this use. Miller's use and the damages to the Wright property forced the City to condemn additional right-of-way from Mr. Wright.

After Miller abandoned the project the City was forced to advertise for a new contractor. In order to complete the bidding process it was necessary for the City to authorize W. R. Holway and Associates to draw up new engineering specifications to show the amount of work which had yet to be completed. For Holway to complete this new bid it was necessary for them to inspect Miller's work so that areas could be designated for repair in the new bid. Holway incurred some difficulty in designating all of the repair work because of the conditions caused by Miller's previous work and the bad weather. The City was in critical need of this sanitary sewer system so it was necessary for

the new contract to be divided into two parts. One part was for the completion of the pipeline and the other part was for the repair of Miller's improper work.

Utility Contractors entered the low bid for completion of the pipeline and received the contract. In the contract with Utility Contractors the repair work on Miller's portion of the pipeline was entered under Item 17 as Miscellaneous Work. The engineers made a lump sum allowance of $35,000.00 for this work with the stipulation that as more data became available on the repairs which needed to be done then the amount would be increased on a work done basis. In fact, Utility Contractors performed this work on a cost plus basis and received $238,308.15 for the repair of Miller's work and $200,708.75 for the completion of the sanitary sewer line.

While Utility Contractors was completing the sewer line, Hydro-Conduit filed a lawsuit against Miller and USF&G. Miller filed a Third Party Petition against the City and the City filed a Cross-Petition against Miller and USF&G and a Third Party Petition against W. R. Holway and Associates. As a result of the lawsuit by Hydro-Conduit and Miller's Cross-Petition deposition costs have been incurred by the City in the amount of $208.06. Throughout the pendency of this lawsuit the City has been incurring damages and discovering new elements of damages resulting from Miller's breach of contract.

HYDRO-CONDUIT VERSUS CITY OF BROKEN ARROW

Hydro-Conduit sued Miller and the City of Broken Arrow for the balance owed on the sewer pipe provided by Hydro-Conduit to Miller for the project. Miller is apparently being sued on his contract with Hydro-Conduit. The City is being

sued either upon a conversion theory or an implied contract theory. From the plaintiff's Trial Brief it is likely that the plaintiff intends to proceed on the implied contract theory. In the interest of brevity the City directs the Court's attention to the plaintiff's Trial Brief wherein the Uniform Commercial Code is discussed. The plaintiff provides the Court with an excellent discussion of the Uniform Commercial Code as it applies to Miller. With the plaintiff's Trial Brief setting the background on the Uniform Commercial Code only a few additional code sections have to be discussed to show the effect of the Uniform Commercial Code on the cause of action by Hydro-Conduit against the City.

The contract between Miller and the City covered both goods and services which were to be supplied by Miller to the City. Miller regularly received goods from Hydro-Conduit and invoiced and billed them to the City. The City paid all the invoices for the sewer pipe. Under 12 O.S. 2-102 the Uniform Commercial Code applies to the contract between the City and Miller as far as goods provided by Miller are concerned. This section states:

> "Unless the context otherwise requires, this article applies to transactions and goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present for sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."

As mentioned above, part of Miller's contract was to provide sewer pipe and other materials to the City in completion of the project. The portion of Miller's contract under the above

statute is clearly governed by Article 2 of the Commercial Code. Under Article 2 of the Commercial Code in Section 12 O.S. 2-403 it is stated:

"Power of Transfers; good faith purchase of goods; entrusting.

1. A purchaser of goods acquires all title which its transferrer had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has power even though

A. the transferrer was deceived as to the identity of the purchaser, or

B. the delivery was in exchange for a check which is later dishonored, or

C. it was agreed that the transaction was to be a cash sale, or

D. the delivery was procured through fraud punishable as larson under the criminal law.

2. Any entrusting of position of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to the buyer in the ordinary course of business.

3. Entrusting includes any delivery and any acquiescence and retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessors disposition of the goods have been made such as to be larson under the criminal law.

> 4. The rights of other purchasers of goods of lien creditors are governed by the articles on Secured Transactions (Article 9), Bulk Transfers (Article 6), and Documents of Title (Article 7)."

The Commercial Code also provides the definition of merchant in 12 O.S. 2-104. Merchant is defined as:

> "Merchant means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transactions or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

Miller was a construction contractor who was regularly involved in the construction of sewer lines and other utilities. As a contractor Miller regularly dealt and sold goods of the type involved in this lawsuit. Hydro-Conduit admittedly entrusted the goods to Miller for use in the project. Miller regularly paid Hydro-Conduit and the City regularly paid Miller for the goods delivered by Hydro-Conduit. The City had no knowledge that Miller had failed to pay for some of the sewer pipe delivered by Hydro-Conduit. When the City paid Miller for the sewer pipe delivered by Hydro-Conduit the City received clear title to all of the goods that were delivered by Hydro-Conduit pursuant to the above statute. Since the City had clear title because of the purchase of the goods from Miller the City cannot be liable to Hydro-Conduit either in tort for conversion or on an implied contract. The fact that Miller later tendered back a credit memo to the City for the pipe which the City had already paid for does not change the nature of the transaction. The City was under no obligation whatsoever to accept Miller's tender and transfer the

pipe back to Miller. The City rejected the tender and retained the pipe.

Should the Court determine that Article 2 of the Uniform Commercial Code is not applicable to the transaction between Miller and the City then the implied contract relied upon by Hydro-Conduit Corporation to collect from the City if illegal and void. The City of Broken Arrow is municipal corporation and is only authorized to contract pursuant to certain bidding procedures as set forth in 11 O.S. 961.1 through 961.36, as amended. The statutes were in force at the time of the alleged implied contract. Furthermore, the City Ordinances of Broken Arrow, 2-24 through 2-27 as amended by Ordinance 634 were also in force at the time of the alleged implied contract. Copies of the ordinances are attached to this Brief. Under the above cited law the City can only enter a valid contract when certain bidding procedures are followed. No bidding procedures were followed by the City in connection with the purchase of pipe from the Hydro-Conduit Corporation. Since the bidding procedures were not followed the contract implied by Hydro-Conduit would be void and illegal and have no force or effect. ***Boardman Co. vs. Board of Commissioners of Pontiac County,*** 116 F.2d 249 (10th Circuit, 1940), ***United States Rubber Co. vs. City of Tulsa,*** 229 P. 771, (Okla. 1924), ***Standard Paving Co. vs. City of Wewoka,*** 39 P. 2d 536, (Okla. 1935), ***City of Muskogee vs. Senter,*** 96 P.2d 534, (Okla. 1939), ***Rose Brothers, Inc. vs. City of Alva,*** 356 P.2d 1083 (Okla. 1960). It should be noted that under the ***Rose Brothers*** case that recovery was not even allowed under the conversion theory because it would destroy the affect of the statutes requiring certain bidding procedures.

CITY OF BROKEN ARROW VERSUS MILLER

The cross-claim filed by the City against Miller is based on a simple breach of contract and involves questions of contract interpretation and the City proving its damages against Miller. To aid the Court in interpreting the contract the Court's attention is directed to the following statutes:

15 O.S. 151, All contracts, public and private, interpreted by same rules.

"All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by law."

15 O.S. 152, Intent controls.

"A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful."

15 O.S. 153, Intention ascertained, how.

"For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules in this chapter are to be applied."

15 O.S. 154, Language governs.

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

15 O.S. 155, Intention ascertained from writing.

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article."

15 O.S. 157, Effect given to every part.

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others."

15 O.S. 160, Words to be taken in ordinary sense— Exceptions.

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

15 O.S. 161, Technical words.

"Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, uness clearly used in a different sense."

15 O.S. 166, Part subordinate to whole.

"Particular clauses of a contract are subordinate to its general intent."

15 O.S. 171, Reasonable stipulations implied.

"Stipulations which are necessary to make a contract reasonable or conformable to usage, are implied in respect to matters concerning which the contract manifests no contrary intention."

Miller entered into the contract with the City on February 4, 1974, and started performance. By January, 1976, Miller had indicated that he was not going to proceed any further with the uncompleted portion of the sewer line until there was a change in the specifications and design of said line. The City determined that Miller had abandoned the contract upon the recommendation of the City's engineers. Under Article XXIII of the

contract Miller is liable to the City for the difference between the cost the City actually paid to complete the project and the cost that the City had agreed to pay Miller. In the present case the City actually paid Miller $1,288,027.29, Utility Contractors $439,016.90, and W. R. Holway and Associates for additional engineering and inspection $35,685.61. The total costs of the project was $1,762,729.51. Miller's contract was $1,540,392.00. The difference between the actual cost of the contract and Miller's agreed contract price is $223,317.51. Miller is liable to the City for this amount because he abandoned the contract. It has already been explained above that Utility Contractors was the contractor hired by the City to complete Miller's project and correct his mistakes. Miller had an obligation under Article XIII of the contract to either correct the mistakes or stand for the expense of said correction. It has also been explained above that the additional engineering and inspection expense incurred by the City to W. R. Holway and Associates was proximately caused by Miller's abandonment of the contract. Said expense would not have been necessary if Miller would have completed the contract as agreed.

During the trial of this case the City of Broken Arrow will show that Miller was directed by the engineers to stabilize those areas which were not naturally stable by digging below the grade line and adding rock. That Miller used an improper construction technique when he attempted to do this and this method would not work. However, when a clamshell was used by the subsequent contractor to dig out the trenches and add the rock the method did not work. That Miller is solely responsible for the construction method he uses to meet the engineering specifications and that neither the City nor the engineers are

responsible for the construction method used. The engineers representatives on the job site did suggest to Miller that he use a clamshell, but Miller rejected the suggestion. Once it is established that Miller did not complete the job as required under the contract and the City incurred expenses as stated above then Miller is liable to the City for the above amount.

For abandoning the contract Miller is also liable to the City for the $49.20 incurred by the City in advertising for new bids. If the Court determines that the City is liable to Hydro-Conduit for the sewer pipe ordered by Miller then Miller would also be liable to the City for whatever amount the City is liable to Hydro-Conduit as this would be an additional cost in completing the contract.

Miller also breached the contract with the City by failing to complete the contract within 365 days as required in Article V of the contract. The agreed upon damages for failure to complete is $50.00 per day for every day over 365 calendar days necessary to complete the project. The project was not completed when Miller abandoned it in January of 1976. Utility contractors officially completed the contract on January 27,1977. The project was two years over due and Miller is liable to the City at $50.00 per day for 722 days in the amount of $36,100.00. To collect this amount all the City has to show is that the contract was not completed on time and that it was actually completed on January 27, 1977.

Miller also breached the contract by failing to indemnify and defend the City for claims and lawsuits brought on behalf and by private property owners damaged by Miller's activity as contractor on the project. Four separate claims and actions were brought against the City by four separate land owners. Leo

West claimed damage for trespass by Miller when he went off the right-of-way obtained by the City and damaged the property of West. This claim was settled for $1000.00. Roy Miggs filed suit against the City for damage caused by Miller and Miller's failure to complete the work properly. This lawsuit was settled for $2,000.00. Jack Wright owned land on which Miller trespassed and caused damage. Because of Miller's continuing trespass and the fact that Miller did not locate the sewer line properly within the right-of-way the City was forced to condemn additional right-of-way and incurred expenses in the amount of $11,850.00 to settle the claim of Jack Wright. For the claim of Jack Wright the City hired independent attorneys to handle the litigation and incurred litigation expense of $1,500.00. To establish these damages the City will, at trial, show the type of damage claimed by each property owner, the reason for the damage, and the amount of settlement. The City will further show that settlement was reasonable under the circumstances and that Miller should have defended these actions and paid these land owners. One property owner, Dr. Clark, still has a lawsuit pending. The City has incurred $3,000.00 in attorney fees to date in defending this case. The City should be reimbursed for this amount and receive a declaratory judgment to the effect that Miller is responsible for any judgment rendered against the City and future cost of defense.

The City has also been sued by Hydro-Conduit because of Miller's failure to pay for material delivered and used in the project. The City has incurred deposition expense of $208.60 in defending this claim. The City has a right to collect this amount under Article XXIII of the contract and other attorney fees of $2,000.00.

In regard to all the City's claims against Miller, the contract with the City shows that the City had no control over the construction of the sewer line. The construction of the sewer line was in the sole control of the engineers and Miller. The engineers only had authority to direct Miller and could not control his choice of construction methods. That the City did not interfer with Miller's performance of the contract and that Miller should be liable to the City for Miller's breaches of said contract in the amount of $281,034.77. USF&G as surety for Miller would be liable for the same amount.

MILLER VERSUS THE CITY OF BROKEN ARROW

Miller's claim against the City is based on two alleged breaches of contract. Miller alleges the City failed to make periodic payments, specifically partial payment No. 19 for the sum of $10,072.82 which payment allegedly became due and owing on January 13, 1976. Miller, for his other alleged breach, states that the City through its engineers failed to furnish specific directions and specifications when unstable areas were encountered. In regard to Miller's allegation that the City failed to pay partial payment No. 19, it should be noted that partial payment No. 19 was not due until the middle of January, 1976. Miller had already abandoned work on the project and the City was in the process of finding that Miller had abandoned the work when this partial payment became due. Under Article XXI of the contract, the City has no obligation whatsoever to make payment to Miller when the contract is abandoned and the City takes possession of the project.

Miller's other allegation of a breach by the City of said contract is that the City, through its engineers, failed to provide suf-

ficient specifications for Miller to complete the work in the unstable areas. In reviewing the contract between Miller and the City, it is impossible to find any obligation on the part of the City to provide specifications of any kind. The engineers, W. R. Holway and Associates, drew up the plans and specifications on which Miller based his bid. These engineers also had the obligation to oversee and inspect the work performed by Miller, Article III of the contract states:

> "The engineers shall give all orders and directions contemplated under this contract in specifications, relative to the execution of the work. The engineers shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract and shall decide any questions relative to said work and the construction thereof. . . ."

Under this clause of the contract, the City does not have any right to give orders because that right is specifically granted to the engineers. The City had no obligation under the contract to provide the directions and specifications. If the engineers failed to provide the directions and specifications as Miller alleges, then Miller may have cause of action against the engineers, but not against the City for failing to do an act it had no power or authority to do. Miller must prove that the City had control of the engineer's activities in carrying out their contract with the City before he can prove any breach by the City.

Assuming that Miller can show control by the City, then Miller's entire case against the City rests upon the following clause:

> "If material is encountered at the planned trench bottom which is unsuitable for supporting the pipe, the contractor shall, under these items, excavate to the additional

depth authorized by the engineers and shall backfill to the normal trench grade by the use of crushed stone in order to provide a stable base for the pipe."

Miller is claiming that this clause of the contract required the engineers to specify the depth of the trench, the size of the rock to be added and the amount of the rock to be added. It is undisputed that the engineers told Miller to add crushed rock as necessary. So Miller's whole claim against the City rests upon the question of fact of whether the direction to add crushed rock as necessary was sufficient when given to a contractor supposedly knowledgeable in the construction of sewer lines. In determining this question of fact the balance of the contract must be considered and given force and effect. Under Article XV of the contract Miller specifically assumed the risk that the nature of the land would not be as assumed or expected. It was Miller's obligation to determine the character of the land and not the obligation of the engineers or the City. Since Miller was directed by the engineers to add rock as necessary it was his responsibility since he had assumed the risk as far as the nature of the land was concerned, to determine how much rock would be necessary in a given locality. The engineers suggested that Miller use a different construction method, but had no power under the contract to control Miller's choice of construction methods. Specifically, the engineers suggested that Miller use a clamshell to dig out the trench and add rock in the unstable areas. Miller did not do this and could not complete the work. However, Utility Contractors, under the identical directions, using the clamshell construction method, were able to complete the work successfully.

As far as Miller's alleged damages are concerned, the Court

should adapt the general approach stated in *Bearden vs. Smith*, 274 P.2d 1015, (Okla. 1954). The Oklahoma Supreme Court in that case stated:

> "A person who agrees to do, for a fixed sum, a thing possible to be done, will not be excused from performing or becoming entitled to additional compensation because unforeseen difficulties are encountered."

It should be noted that Miller, under Article XIII of the contract assumed the obligation of repairing all defective work at his own expense. Furthermore, Miller should have to prove at trial that he would have made a profit on the balance of the contract. It is likely that Miller's expenses for the completion of the contract would have been greater than the balance due on the contract. That circumstance may explain Miller's breach of contract.

CITY OF BROKEN ARROW VERSUS BENHAM-BLAIR & AFFILIATES, INC., d/b/a W. R. Holway and Associates

In the event that Miller prevails on his claim against the City on the grounds that sufficient directions were not provided him by the engineers, then W. R. Holway and Associates should be liable to the City for the full amount of Miller's judgment against the City under common law indemnity. Common law indemnity was defined by the Oklahoma Supreme Court in *State Insurance Fund v. Taron*, 333 P. 2d 508, (Okla. 1958). The Court stated:

> "Indemnity is a right which enures to a person who discharged a duty which is owned by him but which between himself and another should have been discharged by the other. It implies a primary liability in one person, although a second person is also liable to a third party.

> Some benefit must have accured to the indemnitor, the person primarily liable."

If the Court finds that the City had a responsibility to provide Miller with additional specifications for the laying of the sewer line through the unstable areas, then W. R. Holway and Associates should be liable for Miller's judgment against the City because they had the responsibility under their contract with the City to provide all the necessary specifications for the project.

In the event that the City cannot collect its damages from Miller because Miller was not provided with sufficient specifications, then W. R. Holway and Associates should be liable to the City for the amount of the City's damages because of their breach of their contract with the City. The law in Oklahoma stating the damages for a breach of contract is contained in 23 O.S. 21, which states:

> "For breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin."

The City has incurred $281,034.70 worth of damages as a result of the breach of contract by either Miller or W. R. Holway and Associates or both. These damages are the amount that the City has paid out over and above the contract prices that were set by the various contracts involved in this lawsuit.

The City should receive this amount either from Miller or from the engineers, as the Court determines who breached their contract. The City's responsibility under its contract was primarily to pay money and it did not breach that obligation. Therefore, the City should be made whole and recover its damages.

Respectfully submitted,

RAY H. WILBURN & ASSOCIATES and
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CERTIFICATE OF MAILING

I, Ray H. Wilburn, do hereby certify that on the 5th day of November, 1979, I hand delivered a true and correct copy of the above and foregoing Trial Brief to:

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Mr. David H. Sanders
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with proper postage thereon fully prepaid.

S/S Ray H. Wilburn
RAY H. WILBURN

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED
U.S. DISTRICT COURT
NOV 29, 1979
JACK C. SILVER
Clerk

No. 76-C-154-D

HYDRO CONDUIT CORPORATION
Plaintiff

– vs –

JAMES W. MILLER,
d/b/a MILLER CONSTRUCTION COMPANY,
and UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Maryland Corporation
Defendants

– vs –

THE CITY OF BROKEN ARROW, OKLAHOMA
Defendant and Third Party Plaintiff

– vs –

BENHAM-BLAIR & AFFILIATES, INC. a Delaware
Corporation, d/b/a W. R. HOLWAY AND ASSOCIATES
Third Party Defendants

BRIEF IN SUPPORT OF BROKEN ARROW'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, MOTION TO AMEND JUDGMENT AND PROPOSED JOURNAL ENTRY

This lawsuit involves a series of contract disputes between the various parties. Hydro-Conduit Corporation contracted with Miller for the sale of concrete sewer pipe to be used on the Haikey Creek Project. Miller contracted with the City of Broken Arrow to construct the Haikey Creek Sewer project according to a design which was incorporated into his contract. The City of Broken Arrow contracted with Benham-Blair to design the sanitary sewer system to be installed in the Haikey Creek project. Benham-Blair was also to inspect the construction of said project and to advise the City during the project. Miller completed most of the project, but found it impossible for him to finish the project as designed due to extremely muddy conditions at several different locations. Benham-Blair advised the City to find that Miller had abandoned the contract and to put the balance of the work up for bid. The City followed Benham-Blair's advice and hired Utility Contractors to complete the project. Utility Contractors both completed the project and repaired the defective work which Miller had performed and the portion of the project which he completed. The Court made the initial finding that it was impossible for Miller to complete the project as designed.

This case arises out of Oklahoma and is governed by Oklahoma law. Impossibility in the performance of contract is governed by 15 O.S. 103 which states:

"Possibility defined.

"Everything is deemed possible except that which is impossible in the nature of things."

The Oklahoma Supreme Court in the case of *Kansas, Oklahoma, and Gulf Railroad Company v. Grand Lake Grain Company,* 434 P.2d 153, (Okla. 1967), indicated its approval of the approach adopted in the American Law Institute Restatement of Contract. The A.L.I. Restatement of the Law of Contract, Volume 2, Chapter 14, Section 454 defines impossibility as:

"In the Restatement of this subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.

"Comment.

"A. A statement that it is only when facts make performance impossible that they have the operation stated in this Chapter, and that it is not enough that they create extreme difficulty must be interpreted in order to be correct. Impossible must be given a practical rather than a scientific exact meaning. Impracticability rather than absolute impossibility is enough; and the words impossible and impossibility are used in the Restatement of the subject with that meaning. Mere unanticipated difficulty, however, not amounting to impracticability is not within the scope of the definition (see §467)."

The definition of impossibility adopted by the Oklahoma Supreme Court in the *Grand Lake Grain Company* case and set forth in Restatement is further developed in Section 467 of the Restatement which states:

"Unanticipated difficulty.

> "Except to the extent required by the rules stated in Section 455-466, facts existing when a bargain is made are occurring thereafter making performance of a promise more difficult or expensive than the parties anticipate, do not prevent a duty from arising or discharge a duty that has arisen.
>
> "Comment.
>
> "A. As the word is defined in Section 454, impossibility in a legal sense need not be scientific impossibility. Impracticability may prevent a duty from arising, or discharge one; but though a practical rather than a literal meaning is thus given to the work impossibility, unanticipated difficulty or expense although considerable has of itself no legal effect on a bargain, except in cases within the rules states in §§456-466.
>
> "B. A Mutual mistake as to an existing fact of vital importance in some cases prevents a duty from arising (see §502), and if the fact greatly increases difficulty or expense of performance, it is more likely to be of vital importance; but that the difficulty or expense is great and unanticipated is of itself insufficient."

Miller stated in his letters to the architects and in his testimony to the Court that it was impossible for him to complete this contract in areas which were unstable without a design change. Benham-Blair did not provide Miller with a design change or with specific directions, but merely told Miller to use crushed rock as necessary. After Utility Contractors took over the project, they while using the same contract specifications, completed the project. Under the traditional concepts of impossibility there is no question whatsoever that this job was not impossible as per the contract design.

In *Joseph W. O'Brien Company v. Highland Lake Construction Company,* 307 N. E. 2d 761, (Ill.) the Court dealt with a situation whereby the general contractor agreed to install 2,000 feet of storm sewer. The general contractor who was the plaintiff in this lawsuit sub-contracted a portion of the sewer pipe installation to the defendant. The defendant was to jack the sewer pipe beneath certain portions of the highway. In one location the inspector stopped the work of the defendant because he found that 37½ foot of the pipe had been jacked by the defendants off line and off grade. In another location the defendants were unable to jack any of the pipe beneath the highway due to unusual soil conditions. The plaintiff then took over the job and jacked 84½ foot of pipe into place in the second location. The plaintiff then had to use another method of installing the pipe in that location due to the unusual soil conditions. The plaintiff sued the defendant sub-contractor for improperly installing 37½ foot of pipe at the first location and for failing to install any pipe at the second location. The defendant plead impossibility of performance to the plaintiff's claim as applied to the second location. The Court stated:

> "It should be re-emphasized that the plaintiffs seek no damages for the remaining footage out of the total 195 foot which the plaintiffs installed at the second site by utilizing a different method, i.e., poured monolithic. Plaintiffs seek to get damages only for the 84½ feet of pipe which they were actually able to jack into place contrary to defendants' efforts. Under the traditional concept of impossibility, the result is clear. If the plaintiffs themselves were able to accomplish what the defendant asserts was impossible, regardless of the difficulty encountered, then ipso facto performance was not impossible and the defense is non-meritorious."

The same reason obviously applies in the present case. The job was in fact completed by Utility Contractors under the same contract specifications and design that Miller was working with. Since the job was done it obviously could be done and was not impossible. Another case which supports the finding that there was no objective impossibility in this case is *Ballou v. Basic Construction Co.*, 407 F. 2d 1137 (Fourth Circuit, 1969). In this case the defendant was to manufacture 200 concrete columns to specific contract terms. The defendant manufactured 45 acceptable columns and over 100 unacceptable ones. The Court found that the fact the defendant was able to manufacture 45 acceptable columns proves that it was feasible to manufacture the columns according to the contract terms. The Court stated:

> "It is well settled, as a general rule, that if performance is rendered merely difficult or burdensome or unprofitable, the promisor is not excused, and the same is true generally if the impossibility is personal to the promisor, and does not inhere in the nature of the act to be performed."

Since the act was not objectively impossible, it remains to be seen if the act was impractical under the Restatement point of view. Professor Williston explains the Restatement position in Sixth Williston on Contracts, Revised Addition, Section 1931 as:

> "The important question is whether an unanticipated circumstance has made performance of a promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor."

To determine if it was impractical to Miller to complete his contract with the City it is necessary to evaluate what circumstances the parties did or should have anticipated when they entered into the contract. There is no question that the Notice to Bidders put a requirement upon all bidders to examine the site to determine the difficulties that may be encountered in the work. Furthermore, there is no question that in the contract in Article XV the contractor assumes all risks relating to the nature of the land and the character of the work. If these were the only documents, it would be clear that Miller had assumed the risk of the unstable conditions. However, the parties entered into Change Order No. 1 and made a mutual finding that the unstable conditions could not have been anticipated. At this point in time, Miller knew that unstable conditions existed. Miller did not abandon the project at this time nor did he demand a design change. Instead he entered into a modification of the original contract whereby he received more compensation and was paid by the City for all crushed rock which he was to use. The undisputed testimony was that Miller received in excess of $30,000.00 as a result of Change Order No. 1. So that even if Miller did not anticipate the unstable conditions when the original contract was signed, there is no question that he knew unstable conditions existed when he agreed to the modified contract by signing Change Order No. 1. Change Order No. 1 did not change Miller's assumption of the risk because of the nature of the land and the character of the work, but merely had the effect of ratifying said assumption because when Miller entered into this Change Order and received the additional compensation he knew that unstable conditions existed. Miller is in the same position as the contractor in the *Bundy and Stempson,*

Inc. v. Penn. Utilities Corporation, 169 S.2d 499, (Florida 1964). In that case the defendant had contracted to have the plaintiff construct a sewerage collection system. Certain difficulties were encountered on the job which caused it to be impossible to complete the work according to the original plans and specifications. The parties orally changed the plans and specifications, but did not agree upon any additional compensation. The contract in that case provided that the contractor would inspect the site and determine any possible difficulties before making his bid. Sand was uncovered during the construction of the project and it was impossible to complete the project as planned. The Court stated:

> "It is the general rule that unexpected difficulty, expense or hardship involved in performance of a contract will not excuse the promisor from rendering due performance of his undertaking. . . . What occured here was not impossibility of performance, as contended by appellant. The contractor could have protected itself against loss from the adverse conditions encountered, by predetermining their existance through other and more revealing tests or by an anticipatory protective provision in the contract. As stated in 6 Corbin of Contracts, supra, §1333, p. 367:
>
> > '* * * So, one who contracts to make a foundation or a tunnel or other excavation usually investigates for himself the character of the location, whether it be sand or solid rock or swamp or frozen mixtures, before making his estimates and offers. Therefore, the risk is usually borne by the contractor; he is not discharged from duty by actually unexpected difficulty or expense, and he has no right to extra pay for completing the job. * * * '"

Miller also had the option of making sufficient tests to determine the character of the soil. He did not do this and was apparently surprised by the unstable conditions. The City agreed to alleviate Miller's problems by agreeing to pay for the crushed rock to be used stabilizing the trenchs. There is no question that Miller at the time he agreed to this Change Order knew of the unstable conditions. The mere fact that he incurred extra expense or would have incurred extra expense had he completed the project does not relieve him of his duty to complete the project. There is no question that the project was completed by the use of crushed rock and Miller's inability to complete the project is not sufficient justification to allow him to be discharged from his duty to fulfill his contract.

Subjective impossibility is clearly not sufficient grounds to establish the defense of impossibility. Under the Restatement approach as presented in A.L.I. Restatement of Contracts, Volume 2, Chapter 14, Section 455 which states:

> "Subjective Impossibility Distinguished from Objective Impossibility.
>
> "Impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract."

This section of the Restatement was explained in *El Rio Oils v. Pacific Coast Asphalt Co., Inc.*, 213 P.2d 1, (Calif. 1949). The Court in that case stated:

> "California is in accord with the rule as above stated. The impossibility must consist in the nature of the thing to be done and not in the inability of the obilgor to do it....

> If performance is not inherently impossible, and there is an unconditional premise to perform, nonperformance is a breach where the obligator becomes unable to perform even though through causes beyond his control, since he might have provided against them in his contract."

Miller made an unconditional promise to build the Haikey Creek sewer system as per contract specifications. There were no conditions upon which his promise was based. Indeed, the language of the contract in the strongest possible terms explains the risks and duties Miller was assuming. He ratified this contract after he discovered the unstable areas, by signing Change Order No. 1. Under the evidence presented at trial, it was not impossible for Miller to complete his contract. Miller's refusal to lay the sewer line through the unstable areas constituted an abandonment of the contract by Miller and the City was correct in finding that Miller had abandoned his contract. Miller is liable to the City for all damages proximately caused by his breach of contract in failing to complete the project as per his agreement. In this regard, the City directs the Court's attention to the case of *B's Co., Inc., v. B. T. Barber & Associates, Inc.*, 391 F.2d 130 (Fourth Circuit, 1968). This case dealt with a complex situation in many respects similar to the present case.

IMPOSSIBILITY OF COMPLETING THE PROJECT DOES NOT RELIEVE MILLER FROM HIS OTHER CONTRACT DUTIES

Assuming in arguendo that the Court determines it was impossible for Miller to complete the project as per the contract design then Miller is still liable to the City for his breachs of the contract during his partial performance of said contract. Miller

estimates that he completed 93% of the contract. Most of the sewer line laid by Miller was in areas not involving any stability problems. In regard to this 93% of the pipe line which Miller installed, it was the uncontested testimony that there were numerous defects in said work. Miller had laid pipe to the wrong grade, failed to excavate deep enough in several areas, failed to properly install the joints leaving gaps between joints, and properly install manholes and failed to cover the exposed end of the lines with night caps causing mud and water to enter the sewer lines. The uncontested testimony was that the City of Broken Arrow incurred an expense of $238,308.15 to Utility Contractors to correct Miller's defective work. The uncontested testimony also showed that the City of Broken Arrow has incurred legal expenses and settlement costs for lawsuits filed by property owners arising out of Miller's work in the amount of $19,550.00. The 7% of the sewer line which Miller found impossible to install should have no affect upon the balance of this contract which he did install. The American Law Institute Restatement of Contract, Volumn 2, Chapter 14, Section 463 states:

> "Partial Impossibility.
>
> "Where impossibility of performing part of the performance promised by a party to a bargain is of such character than if it related to the entire performance it would prevent the imposition of a duty or would discharge a duty that had arisen, and the remainder of the performance is not made materially more difficult or disadvantageous than it would have been if there had been no impossibility, the existence of duty is affected only as to that part; and if performance of the whole contract is possible with only an unsubstantial variation, the prom-

> isor is under a duty to render performance with the variation.
>
> "Comment:
>
> * * *
>
> "B. Unlike temporary impossibility, impossibility of performing part of a promise rarely discharges a promisor beyond the extent of the impossibility. . . ."

In the present case, Miller admittedly performed a substantial portion of the contract and it is undisputed that he was paid for his performance. However, in performing this portion of the contract Miller breached several contract clauses. Miller's major breach involves his defective work. Since Miller has collected for the part of the contract which he has performed, he should not be able to complain if he is required to perform that portion of the contract to the contract terms. Judge Eubanks recognized on page 12, line 24 of the transcript of his ruling that Miller is liable to the City for any defective work performed by Miller in the portion of the contract which he completed. Judge Eubanks stated:

> "Well, while it is on my mind, many of these conditions shown in these pipes are pipes after the new contractor took over as evidenced by these exhibits and depicted in them is a fault of the contractor and I am going to deduct the expense of redoing them by the new contractor from the amount sought by Miller here. . ."

The Court again recognized on page 19 of the trial transcript starting at line 9 Miller's obligation to pay for defective work. Judge Eubanks stated:

> "The idea of loss profits, I think, has already been covered but if it has not thoroughly been covered under

the category of termination for impossibility of performance cutting off future profits, I will cut it off this way by telling the contractor if you would have done all the work that you got paid for completely, according to the plans and specifications so that we didn't have this settling out thing it would have been different but the cost of going in there and repairing those mistakes where the pipe was not deep enough because of the shale problem and the other gaps that this fine young man testified about, it has got to be paid for by the contractor and that is going, of course, to be subtracted from the amount, retainage. . ."

"The idea of loss profits, I think, has already been covered but if it has not thoroughly been covered under the category of termination for impossibility of performance cutting off future profits, I will cut it off this way by telling the contractor if you would have done all the work that you got paid for completely, according to the plans and specifications so that we didn't have this settling out thing it would have been different but the cost of going in there and repairing those mistakes where the pipe was not deep enough because of the shale problem and the other gaps that this fine young man testified about, it has got to be paid for by the contractor and that is going, of course, to be subtracted from the amount, retainage. . ."

The Court's ruling in this respect is in line with the Restatement position. However, the Court failed to make a determination as to the exact amount of damages incurred by the City in repairing the defective work on the portion of the pipeline completed by Miller. The undisputed testimony at trial and Broken Arrow/Benham-Blair Exhibits 24 through 32 as they apply to miscellaneous Item No. 17 show that the City paid Utility Con-

tractors $238,309.15 to correct Miller's defective work. This amount did not include the money paid by the City to Utility Contractors to complete the unfinished portion of the pipeline. The cost of repair for defective work is, of course, the correct measure of damages under *Stewart v. Riddle*, 184 P. 443. So there is no question that Miller and U.S.F. & G. is liable to the City for the cost of repair.

The Court also found correctly on Page 18 of Judge Eubanks ruling starting at line 21 that Miller was liable to the City for damages to the right-of-way in the amount of $19,550.00. The Court's ruling in this respect is also in line with the Restatement position in that Miller had an obligation under this contract with the City to defend and indemnify the City from any claims or lawsuits filed due to his activities. The impossibility Miller encountered in completing the project did not relieve Miller of his duties to conform to the contract in relationship to the work he had already performed. The lawsuits by property owners were the result of work performed by Miller and Miller's activities on the project. The partial impossibility encountered by Miller did not relieve his liability to defend and indemnify the City.

BENHAM-BLAIR & AFFILIATES, INC., IS LIABLE TO THE CITY OF BROKEN ARROW FOR ALL DAMAGES PROXIMATELY CAUSED BY BENHAM-BLAIR'S FAILURE TO FULFILL ITS CONTRACT WITH THE CITY.

Assuming in arguendo that the Court determines that it was impossible for Miller to complete the project and that the impossibility discharged Miller's obligations to fulfill all duties under the contract, then Benham-Blair is liable to the City of

Broken Arrow for failing to properly design the project and fulfill its other contract duties.

During the trial, Miller proved that he had requested a design change or further specifications from the engineers on numerous occasions. Benham-Blair replied to Miller's request by directing Miller to use crushed rock as necessary. This was the only direction ever provided by the engineers to Miller other than the suggestion by the engineers that Miller use a clamshell. As a result of the engineers' failure to provide Miller with sufficient directions, Miller was unable to properly install the sewer line through unstable areas. The Court has determined that it was impossible for Miller to properly construct the sewer line through the unstable areas in compliance with the specifications and directions provided by Benham-Blair. As a result of this impossibility Miller was discharged from his obligation to fulfill the various duties he had assumed in his contract with the City.

Benham-Blair in their contract with the City agreed to assume the following duties as per Benham-Blair/Broken Arrow Exhibit 952:

> "1. Serve as the City's professional representative in the planning, design and inspection or construction of the project, and shall give consultation and advice to the City during the performance of its services.
>
> "4. The engineers shall provide at its own expense a suitable engineering staff to plan, design, prepare the plans and specifications, and inspect the construction of the improvements. The engineering staff shall consist of engineers, inspectors, and assistance as may be necessary to carry on all the engineering work required in connection therewith, in an efficient and expeditious manner.

"5. The engineers shall direct and shall be responsible for all of the engineering work needed in the proper planning, designing and inspection of the construction of said improvements; it shall prepare all maps, plans, specifications, descriptions and reproductions, and, subject to the approval of the City, all contract forms, bond forms, bidding blanks, and notices to bidders asking for bids for said work.

"6. The engineers shall make all surveys and establish base lines and levels for construction of the work; it shall supervise the making of all underground investigations deemed necessary for the proper design of improvements.

"B. **Design Services**. Design services for the Project shall include the preparation of preliminary and final plans for the project, as herein specified, together with all specifications and related documents required for the construction of the Project by the City's construction contractor."

The engineers failed to have the necesary underground investigations made in order to insure a proper design. Furthermore, the engineers failed to provide all of the specifications and related documents required for the construction of the project by Miller. Miller repeatedly requested specific instructions from the engineers and did not receive any instruction except use crushed rock as necessary. The engineers' failure to provide Miller with sufficient instructions was the proximate cause of the impossibility which allowed Miller to be discharged from his contract. As a result of Miller's discharge from his contract obligations, the City expended $238,308.15 for the repair of Miller's defective work. The City could not collect for this defective work due to the fact that Miller was discharged from

his contract because of the impossibility caused by the failure of Benham-Blair to provide sufficient engineering instructions.

The evidence at trial also showed that the City relied upon the advice of its engineers. Benham-Blair advised the City that Miller was not properly completing his contract and that the City should declare that Miller had abandoned his contract. The City relied upon the advice of Benham-Blair and found that Miller had abandoned his contract. It should be noted that the City in its contract with Benham-Blair had specifically contracted for the advice of the engineers during the construction of the project. As a result of finding that Miller had abandoned the contract, the City was forced to put the remainder of the project up for bid. This extra bidding process allowed the engineers to charge the City $35,685.61 for additional engineering and inspection expenses as per the testimony of Mr. Whitlock. Under Oklahoma law, the proper measure for breach of contract is contained in 23 O.S. 21 which states:

> "For breach of an obligation arising from contract, the measure of damages, except for otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin."

The failure of Benham-Blair to provide Miller with sufficient engineering instructions, was the sole and proximate cause of making it impossible for Miller to perform his contract with the City of Broken Arrow. Benham-Blair clearly had the obligation under its contract with the City to provide all engineering

directions needed by the contractor. The engineers' failure to provide the directions proximately caused Miller's release from the contract and forced the City to incur the additional expenses of repairing defective work which had been performed by Miller. Furthermore, the engineers certified to the City that Miller had abandoned his contract and caused the City to find a new contractor. In finding a new contractor, Benham-Blair profited from having Miller's contract terminated by the City. The City's total damages as a result of Benham-Blair's breaches of its contract with the City are $273,993.76.

Miller has succeeded in obtaining a judgment from the City of Broken Arrow for the rental value of his equipment in the amount of $45,000.00. This rental value was for the period of time Miller was waiting for additional engineering instruction from the engineers. The engineers had an obligation under their contract with the City to provide Miller with these instructions. The engineers' failure to provide Miller with these instructions was the direct and proximate cause of Miller obtaining a judgment against the City for this element of damage. The engineers are clearly liable to the City for the judgment awarding Miller this element of damages.

Respectfully submitted,
RAY H. WILBURN & ASSOCIATES

By S/S Ray H. Wilburn
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Attorney for The City of Broken Arrow

CERTIFICATE OF MAILING

I, RAY H. WILBURN, hereby certify that on the 29th day of November, 1979, I mailed a true and correct copy of the

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Petitioner's Reply Brief

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No. 81-1407

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENHAM-BLAIR & AFFILIATES, INC.,
d/b/a W. R. Holway & Associates
Petitioner

v.

THE CITY OF BROKEN ARROW, OKLAHOMA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Respondent, City of Broken Arrow, attempts to avoid the effect of the Court of Appeals' departure from the accepted and usual course of judicial proceedings in this cause by arguing that,

(1) This case is of no importance to the public.

(2) Petitioner had adequate notice of the City's additional independent claim in the trial court.

Argument and Authorities

(1) Without taking issue with the quoted text of the authority relied upon in Broken Arrow's answer brief, we

respectfully suggest that Rule 17 of the rules of this Court expressly sets forth that the Supreme Court will consider exercising its jurisdiction when a Federal Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

That is the basis for the Petition in this case. In addition thereto, it is respectfully suggested that when such action by a Court of Appeals amounts to a flagrant denial of due process, it is a matter of extreme importance to all persons guaranteed that right by the Constitution of the United States of America.

(2) The City's second argument appears to be more an attempt to obscure the issue than to address it. Benham-Blair asserts in its Petition for Certiorari that the independent claim for damgages in addition to the claim for third party indemnification is asserted for the first time on appeal. This is predicated upon the fact that there is no pleading or other paper of any kind in the record in the Court of Appeals (other than Broken Arrow's brief) wherein the additional independent claim which is the subject matter of this Peitition is set forth.

Broken arrow's briefs filed in the Trial Court, which are set forth as Appendices A and B of its answer brief herein and now relied on as an assertion of that claim in the Trial Court, are not a part of the record on appeal.

Thus, insofar as the Court of Appeals was concerned, the first time such a claim was ever asserted was in Broken Arrow's brief filed with the Court of Appeals.

Now Broken Arrow argues that it did in fact make the claim in the trial court. We address that issue.

The case was called for trial on November 5, 1979. At the time the attorneys appeared on that date to announce their readiness for trial. Broken Arrow's attorney handed copies of a trial brief to the other attorneys present. Benham-Blair's attorneys did not read this brief until after the trial was concluded. The case was tried without reference to it and the Trial Court, quite properly, paid no attention to the concluding remarks therein to the effect that if Broken Arrow did not recover certain damages from the contractor Miller, it should recover them from the engineers, Benham-Blair.

Benham-Blair went to trial under the impression that it was assisting in the defense of Broken Arrow, and in turn of itself, as to the contractor Miller's claim for damages for wrongful termination of his contract and other incidental damages. Broken Arrow's and Benham-Blair's attorneys had worked together in preparation of the defense of the contractor Miller's action against Broken Arrow. Benham-Blair's attorney informed the Court in his opening statement that "Mr. Wilburn (Broken Arrow's attorney) and I have worked together in the

defense of this case . . . We have marked most of our exhibits as common exhibits." (Transcript Vol. 1, p. 41) Broken Arrow offered no evidence against Benham-Blair during the trial.

On appeal, the Court of Appeals found and adjudged that, in addition to third-party indemnification, Benham-Blair should be liable to Broken Arrow on independent claims for damages never asserted against it in the trial court, i.e., the additional cost of employing another contractor to complete the work, the repair of contractor Miller's improper work, additional engineering fees, etc. (See quotation of Court of Appeals judgment, p. 7 of the Petition for Certiorari.)

By quoting Rule 15 of the Federal Rules of Civil Procedure relating to amendment of pleadings, the City of Broken Arrow seems to contend, without so saying, that this trial brief was an amendment of its third party complaint.

The Federal Rules of Civil Procedure do not authorize or require the filing of trial briefs. In practice they are often requested by trial judges, but in this case Broken Arrow's was a gratuitous offering. The only pleadings authorized are complaints, answers and replies. Rule 7(a) provides as follows:

> "Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as

> such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. *No other pleading shall be allowed,* except that the court may order a reply to an answer or a third-party answer." (Emphasis added)

Benham-Blair went to trial thinking it was defending a third party claim and assisting in the defense of the principal claim. Is it to be charged with knowledge of and the obligation to defend against an additional independent claim contained in a trial brief filed and served just as the trial commences? We respectfully submit that it should not.

Our search discloses no case in which this honorable Court has considered a situation of this kind, but the Courts of Appeals have found no difficulty with such. In *Practical Construction Company v. Granite City Housing Authority,* 416 F.2d 540 (1969), the Court of Appeals for the Seventh Circuit held that when the Plaintiff did not plead waiver in his complaint, the last minute insertion of such an issue in an answer to a motion for summary judgment did not constitute the trial of such an issue by express or implied consent.

In *Case v. State Farm Mutual Insurance Co.,* 294 F.2d 676 (1961), where the trial court had dismissed a complaint which asserted a claim for damages for wrong-

ful termination of contract, the plaintiff asserted on appeal that the complaint should not have ben dismissed because the court could have granted relief for wrongful interference with his contract. In rejecting this argument, the Court of Appeals for the Fifth Circuit said,

> "The only damages claimed by the appellant were those based entirely on his claim that the written contract was wrongfully terminated, ..."
>
> * * *
>
> "If appellant had desired to pursue a charge that appellees had wrongfully interfered with the running of his business in violation of the terms of the written contract, it would have been quite simple for him to file an amended complaint."

Here, as there, it would have been simple for Broken Arrow to have filed an amended complaint. The case was on file nearly three years before it went to trial. There was extensive pre-trial discover. Two pre-trial orders precisely defined the issue between these parties as third-party indemnification and no more. In Moore's Federal Practice, Second Addition, §16.19, it is stated, with supporting authority, that

> "Unless and until the court is persuaded to modify its pre-trial order, the parties are bound by their admissions and stipulations included in the order, and may not contradict its terms."

There is no evidentiary question presented, and the record is not subject to different interpretations, as

asserted by Broken Arrow.

What happened is crystal clear. Whether it shall be permitted to stand is the only question.

Conclusion

The petitioner respectfully requests that its petition be allowed and suggests that this is an appropriate case for summary reversal pursuant to Rule 23.1 of the Rules of this honorable Court.

Respectfully submitted

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